IN THE MUNICIPAL CRIMINAL COURT OF THE CITY OF TULSA
TULSA COUNTY, STATE OF OKLAHOMA

CITY OF TULSA PLAINTIFF,	)	
	)	TICKET NO. 7569655
Vs.	)	
MARVIN KEITH STITT DEFENDANT	)	

TRANSCRIPT OF PROCEEDINGS
JUNE 15, 2022
BEFORE THE HONORABLE JUDGE MITCHELL MCCUNE

A P P E A R A N C E S

FOR THE CITY OF TULSA:	MS. BECKY JOHNSON Chief City Prosecutor
FOR THE DEFENSE:	MR. SABAH KHALAF Attorney at law
	MR. BRETT CHAPMAN Attorney at law

Reported by
LAUREN KINNEBREW
Court Reporter

P R O C E E D I N G S

THE COURT: We are on the record in City of Tulsa vs. Marvin Keith Stitt, 7569655. Present on behalf of the defendant who is not present, I believe I waved his appearance last time I think-

MR. KHALAF: Yes, sir.

THE COURT: Mr. Khalaf and Mr. Chapman, present on behalf of the City of Tulsa is Mrs. Johnson, and I don't know if you have been on the record before on this so I will go full name, Mrs. Becky Johnson, and Mr. James Hall. We have numerous matters on- is the defendant ready?

MR. KHALAF: Yes, sir.

THE COURT: Is The City ready?

MRS. JOHNSON: Yes, Judge.

THE COURT: For the record, I've got a procedural posture as follows, and council correct me if I'm wrong. On February 3, 2021 the defendant was cited with a speeding charge in the City of Tulsa. On February 4, 2021 the defendant's speeding citation was filed with the court. On December 2, 2021 defense filed its first motion to dismiss. On December 22, defendant filed his brief in support of motion to dismiss. On March 15, 2022 plaintiff filed its response to defendants motion to

dismiss brief in support. On April 22, 2022 after a hearing, this court filed its memorandum opinion and order, denying the defendant's motion to dismiss, due to the courts inability to properly spell the caption. Later on that date, on April 22, 2022 this court filed a corrected memorandum opinion and order, denying the defendants motion to dismiss. On May 9, 2022 The City filed its motion to amend information. On May 17, 2022 defendant filed his motion for specific discovery. On May 23, 2022 defendant filed his second motion to dismiss in brief in support, and requested for a court order for specific findings. On July 3, 2022 The City filed its motion to strike on the alternative, in response to defendants second motion to dismiss in brief in support. On June 7, 2022 The City filed its notice of error in City's quote "Motion to strike, on the alternative, in response to defendants motions to dismiss in brief and support," end of quotation. And on June 10, 2022 defendant filed his sur-reply notification to plaintiff, that legal authority exists, and controlling jurisdiction directly, adverse to position claimed by its attorneys RE: Section 14 of the Act of June, 1898. For the record, that should be considered a reply by the defendant.

MR. KHALAF: Can we move to amend the title to a

reply?

THE COURT: As discussed in chambers?

MR. KHALAF: Yes, sir.

THE COURT: Any objection?

MRS. JOHNSON: No, as long as we could amend our currently titled reply, to sur-reply.

THE COURT: I will notate it. It may be a little beyond repair at this point. I understand, it could be a clerical issue, so I will grant it to all parties to make- if they desire to make the corrections in the record. I think we can make it work out, I just want to have a clear record. On June 14, 2022 the City of Tulsa filed its motion to strike defendants improper sur-reply on the alternative. To convert the sur-reply to a third motion to dismiss, and The City's request for more time, and to continue hearing on second motion to dismiss. On June 15, 2022 The City filed its response to defendants motion for specific discovery, and the city's reply to defendants quote and unquote, improper sur-reply. I believe that is where we are at with our procedural posture, and history on the case. Is that correct, Mr. Chapman?

MR. CHAPMAN: Yes, I believe so.

THE COURT: Mrs. Johnson? Thank you ma'am. It's my understanding after having prehearing conference, that

The City's motion to strike defendants sur-reply or the alternate, and I'm paraphrasing. The continuance is withdrawn, is that correct?

MRS. JOHNSON: Yes your Honor, in its entirety.

THE COURT: All right, and Mr. Chapman, does that mean all parties are in agreement that we are now essentially moving, that the sur-reply be the reply, and The City's response, or reply to the sur-reply would actually be a sur-reply?

MR. CHAPMAN: Yes, sir. And the one we will proceed on today I filed the corrected, which we would re-title "corrected reply," and then incorporating the various exhibits of the other one, filed on June 10.

THE COURT: All right, so nobody has any objection with moving forward, as we stand on a second motion, with a response- we are moving forward, and there is no objections to any of the pleadings or anything filed right now as it stands, or any portions thereof. I'm not saying you agree with the arguments, but I'm just talking about the documents themselves being filed. The second motion to dismiss, The City's response, the defendants reply, also defined as a sur-reply, and The City's sur-reply, or what also has been identified as the reply to the sur-reply, is that correct, Mr. Chapman?

MR. CHAPMAN: Yes, sir.

THE COURT: Is that is that correct, Mrs. Johnson?

MRS. JOHNSON: Yes, your Honor.

THE COURT: So then, The Court will move to have the following matters for consideration today: Plaintiff's motion to dismiss- correction, defendants motion to dismiss, the defendants motion for specific discovery, which we have had a pre-hearing conference on, and we will make the announcements in the record, and The City's motion to amend information. That's all I have for today, folks. Is that correct, Mrs. Johnson?

MRS. JOHNSON: Yes, Judge.

THE COURT: Is that correct, Mr. Chapman?

MR. CHAPMAN: Yes, Judge.

MRS. JOHNSON: Your Honor, may I raise one last issue?

THE COURT: Yes.

MRS. JOHNSON: Our June 3 filing that's titled 'City's motion to strike' or in the alternative, in response to the second motion to dismiss. We would withdraw in part, to not attempt to strike their motion, and just respond to it, and get the issues addressed today.

THE COURT: So the city is moving for a- is withdrawing the motion to strike, and is going to operate as a response to the motion to dismiss, is that correct?

MRS. JOHNSON: Yes, Judge.

THE COURT: Everybody's in agreement?

MR. CHAPMAN: Yes, sir.

THE COURT: All right, that is what we are doing. So, as I sit here today it looks like all we've got left is the merits on the motion to dismiss by the defendant, and once again, we've got potential for the- depending upon what happens here, the potential for a motion to amend information, and then the discovery issue, which I believe in chambers Mrs. Johnson and Mr. Khalaf preliminarily worked that out. All right, here we go. Mr. Chapman, you have the ball.

MR. CHAPMAN: Thank you. Okay, as the court noted, it has kind of, sort of been a strange procedural posture on it, so I will do my best to make sense of it all. With regard to subject matter jurisdiction, just for the purposes of the record, I wanted to note a couple of cases. Jurisdiction is what gives a court the authority to act or try a case held by the Oklahoma Court of Criminal Appeals, and the BUIS v. State 792 P.2d 427, and the Oklahoma Court of Criminal Appeals has also held that the lack of jurisdiction may be raised by a party at any time; Omalza v. State, 911 P.2d 286. And finally the court of crims has stated that quote "Jurisdiction has no place where a trial court has jurisdiction of a

person, of subject matter, and authority under law, to pronounce a judgement and sentence rendered." And this was stated in ex parte Simmons, 96 Okla. Crim. 279 P.2d 935. And so the reason I want to mention those, is just for the convoluted nature I suppose of how this has gone down with regard to the second motion to dismiss. It's our understanding of the law, that we can raise- or question subject matter jurisdiction at any time, so what we would want to consider is the now response, the corrected response, is basically part and parcel with the second motion to dismiss. Going to the grounds on that, and also incorporating the first motion to dismiss, one thing I mentioned in the second motion, in the procedural background section of the second motion to dismiss, was how important the procedural posture, I guess from Shaffer and it's progeny is what I would call it. Because this whole Act of June 28, 1898 section 14 argument, arose in City vs. Shaffer. So in that second motion, I reference the nature of the orders in the analysis section by the court in Shaffer. And then I believe I also reference, in that procedural background section in that second motion to dismiss, I reference the nature of the same order with regard to Mr. Hooper, and how that's relevant to us, is essentially in each of these 3 orders, under the analysis section put in a

memorandum opinion or order, however it's titled across the 3 cases, the court has an analysis section and essentially it's 7 paragraphs long. And in Shaffer, what was raised there was different than what Mr. Stitt raised in his first motion to dismiss in brief and support. And in Hooper, what was raised there was different than what we raised in our first motion to dismiss, in brief and support. Now that not withstanding, I have compared the analysis section of both Shaffer and both Hooper, and those 7 paragraphs are repeated almost verbatim in the analysis section. I think that the one difference is under Hooper in paragraph 7, where it starts with following the passage of the Curtis Act, at the end it states, "in part," which is a new addition but it's a minor addition. Now turning to our first motion to dismiss, we challenged essentially in the first motion to dismiss, that the temporal nature of all of these territorial acts, such as I would call them, that they were not intended to be anything other than limited in form, for a specific period that ended upon the incorporation of Indian territory into Oklahoma on November 16, 1907. These were not particularly raised by Shaffer or Hooper. Yet in our order, I believe it was April 22, 2022 in the analysis section it's the same 7 paragraphs, and only minor

changes in paragraph 2 instead of Native Americans-

THE COURT: I know what I wrote, Mr. Chapman.

MR. CHAPMAN: Huh?

THE COURT: I know what I wrote.

MR. CHAPMAN: Okay, well I'm saying for the appellate record. In paragraph 2 the court writes Indians, instead of Native Americans. Paragraph 3 adds in "of the City of Tulsa," and paragraph 4 starts off with "as previously stated by the court," and the rest appear to be- and so, the reason this is important to us, is in our second motion to dismiss, we raise something very specific. And in that, there is a finding by The Court based upon the arguments by The City of Shaffer and its progeny, that the City of Tulsa- and I will give this specific provision. It is the 5th paragraph. "The U.S. Congress address jurisdiction in Indian country on June 28, 1898-" I'm sorry I will go slower.

THE COURT: So just a reminder everybody okay, she is in charge even above me on the record, and when we read stuff, and Mr. Chapman, I'm right there with you. When I read I fly, so I get it, right? But when you read try to remember to slow it down, take a peek at the court reporter, and she will kind of let you know if you're a little bit ahead of pace. If you will restart.

MRS. JOHNSON: May I? We are talking about a paragraph.

I'm not sure which case you are referring to.

MR. CHAPMAN: The order of this case. April 22.

MRS. JOHNSON: Okay, thank you.

MR. CHAPMAN: So this 5th paragraph, it states quote, "The U.S. Congress addressed Municipal jurisdiction in Indian country on June 28, 1898, after passing an Act for the protection of people in Indian territory, and for other purposes with the citation. Section 14 of the Curtis Act states as follows, and there is a block citation to the entirety of section 14. And then in the 6th paragraph, also important, it states: "The City of Tulsa was incorporated under the provisions of the Curtis Act. After incorporating, the City of Tulsa has repeatedly passed and enforced ordnances, and pursuant to the Curtis Act, the City of Tulsa has had subject matter jurisdiction to hear violations of its ordnances since 1898." In our second motion, what we challenged in part was the date of incorporation, because it's our contention that the Act of May 2, 1890 under Section 31 and what follows, is the controlling Act. That Act is known colloquially as the Oklahoma Organic Act, which created the Oklahoma Territory in the first 30 or so sections, I'm not sure of the exact number, but in the remaining sections it addressed jurisdiction in the Indian territory. Prior thereto, neither one of them was

a formation in the sense of the word. And so what we raised in our second motion, was the timing of incorporation, because the City of Tulsa in fact incorporated before the existence of the Act of June 28, 1898 and Section 14. In support thereof, we cited a similar jurisdiction, Sapulpa, which also incorporated prior thereto, which we will make a point to later on. Generally, all of this goes to the proposition that it was a temporary measure, right? So we feel that we have never had a response, or at least an analysis done on our first proposition, which raises similar questions of temporal proximity, that stopped in November of 1907, which we raise again in our second motion. In support of that proposition, what we do is introduce a competing form of preliminary power, because the entirety of the City of Tulsa's argument, it has to be incorporated under section 14 of the Act of June 28, 1898, because they have to tie it into race-based preliminary power, which is controlling on Native American cases. Native American issues. In our second motion, we create- not create, we bring in a competing form of preliminary power, based upon the constitution with regard to territories and properties in the United States, and we stand by that proposition, because that is in our estimation, why, when they created the Organic Act, that

was temporary in nature. In fact, I believe they state it all throughout it, at least as far as Oklahoma territory. In the Act of 1890, they say that it's a temporary provision, it's provided a temporary government, so on and so forth. So having done that, we note from starting from Shaffer and it's progeny, the utter lack of support on published case law of the proposition, if the proposition that the City of Tulsa incorporated under the provisions of the Act of June 28, 1898 in section 14, all they cite is one case from a 1920's case from a federal court called "City of Tulsa vs. Oklahoma Natural Gas." So in our second motion, again what we raise is a new proposition. We also mentioned how the City of Sapulpa had incorporated slightly before the Act of June 28, 1898 ever existed, and we cite the case of Sapulpa vs. O.N.G., which is an Oklahoma Supreme Court decision. Noting very specifically that one is controlling, because it's an Oklahoma Supreme Court case. Again, these cases stand for the proposition, at least in those cases what they were about were contracts, or acts made by the incorporated towns in the early 1900's during the territorial days, and what they did was, they had made contracts with either Oklahoma Natural Gas, or their predecessor companies, and essentially they said, all

right, we are going to let you lay your pipes or whatever through our cities, but in return you guys are going to charge us a fixed rate of whatever, 10 cents per whatever the unit is of gas, for a period of 20 years. This was in the early 1900's in territorial times. Well, in the interim Oklahoma, Indian Territories incorporated into Oklahoma, and Oklahoma becomes a state in November 1907. Everybody continues on, at least in those cases under the agreements made by the incorporated towns. But at a certain point, the Oklahoma Corporation Commission, which was also created upon the passage of the Oklahoma constitution, or I guess upon statehood, the Oklahoma Corporation Commission said hey gas companies, if you guys want to raise the rates, go right ahead. Well, of course this makes the incorporated cities mad, because they had an agreement. So in both cases, the City of Tulsa and City of Sapulpa in the 20's, went to courts, various courts, I guess the Corporation Commission Court in the case of Tulsa, they went to the eastern district- the northern district sorry. They went to a federal court and are saying hey, we have this agreement that predates Oklahoma. You know what, we have preliminary power from Congress to do this, and essentially what the holding in both of those cases, the City of Tulsa, which is again the only case

the city ever cites in support of their opposition. In both of those cases they stand for the proposition of, okay well, you know what, essentially you are just an arm of Congress, you know? What you did when Oklahoma became a state, it stopped. You became subservient to Oklahoma. And again, that plays into our argument, with regard to criminal jurisdiction and criminal courts that I made at the hearing on this matter, which I believe the hearing transpired, I want to say it was maybe March 22. But at the hearing, if this court would remember, I cited a case called ex parte Murphy, perhaps. It's a 1917 case, and therein I cited that reason for the proposition, that the municipal court is a police court, such as they were called at that time were basically abrogated. The City of Tulsa's court at that time. The judge quit, the city attorney quit, and it kind of shut down, because the Oklahoma Court of Criminal Appeals held that you had to give somebody a jury trial, if you were going to fine or imprison them. So they had to completely change their methods. And again, all of this goes towards the proposition that a stark change happened on November 16, 1907. And so again, in addition to that in the response that I most recently filed, or the corrected response that we're also proceeding on, I outlined two cases that were not cited by the city, or

actually there is 3 case. There is Fortune v. Incorporated town of Overton number 1, a 1904 case. There is Fortune v. Incorporated town of Overton number 2, a 1905 case, and Everts v. Bixby, that's a 1909 case. What those cases stand for the proposition is, is that in every single one of them, completely and wholly contrary to the City's many arguments or many statements, which, let me stop right here. There is no basis for the fact as I mentioned in the response that I'm proceeding on most recently, for the fact that Congress expressly, just no doubt about it can't even question it, granted the City of Tulsa criminal subject matter jurisdiction in 1898. That proposition has no basis in law. There's no- they just stated that. That is what I would call an a posteriori, I'm not sure if I'm saying that right, but that's a proposition of that nature. And so to me, it's almost a question of fact with regard to that. So the importance of these two cases that I reference, or I guess these 3 cases, the utter importance of these cases is, is that in each one, it shall be noted that the attorneys for the incorporated towns are saying the exact opposite of what the City of Tulsa is saying today. They are saying, hey wait a minute, when we enforce a municipal code violation, also what would be known today as public

intoxication, or disturbing the peace while intoxicated. They are saying hey wait a minute, these are outright civil cases, they are not criminal. Under no circumstances are they criminal. They are going to multiple appellant courts saying that, and ironically enough, the people that are saying, wait it's criminal, these are criminal, this is a criminal case. Basically what Mr. Fortune and what Ms. Everts are saying are, Congress expressly granted preliminary power to the incorporated towns under the Curtis Act of 1898. That is the argument they are effectively making. The City is making another argument. In each of these 3 cases, ironically enough, they are all ruled in favor of the incorporated towns, on the basis that they are civil proceedings, on all of them. Now, what's important in these matters is are the dates. And I know there has been some squabbles about when The City incorporated. I know in their response is, what difference does it make? If it was just before, just after, whatever, the Curtis Act of June 28, but the dates are very, very important because this was a very fluid- imagine yourself living in 1889 through 1907. You are living life in that time, there is a very fluid situation, things change. So I want to start next, going through the changes that were made and how important this is. So, on the Act of March

1, 1889 under sections 1-7 that Congress passed on that date, this is when they create the United States District Court for Indian Territory. Before that, it didn't exist, and so that's a very important law for that. And then the next year, they passed the Act of May 2, 1890, which is effectively an Organic Act for temporary government. In some of those cases I cited, in the second brief actually stand for that proposition. But, in section 30 of the Act of May 2, 1890, Congress divided this United States District Court they created the year before, into 3 division. There was division 1 at Muskogee in the Muskogee Nation, there was division 2 at South McAlester in the Choctaw Nation, and there was division 3 in Ardmore, in the Chickasaw Nation. Okay, the next section of that Act, section 31 of the Act of May 2, 1890, what Congress does is they extend certain general laws in the state of Arkansas as published, in the 1884 volume known as Mansfield's Digest and the Statutes of Arkansas. What they do is put into four certain chapters therein over the indian territory, and chapter 29 which is entitled corporations, in division 1 municipal corporations, in sections 722 to 959, but they don't stop there. Under provisions of section 33 of the Act of May 2, 1890 Congress extended certain general laws in the State of Arkansas as published in that same

Mansfield's Digest, and put into force certain chapters therein over indian territory relating to chapter 45, criminal law. In sections 1491 through 1961, and chapter 46, criminal procedure, sections 1962 to 2440. They still didn't stop there. Under previsions of section 39 of the Act of May 2, 1890, Congress extended again certain general laws in the State of Arkansas, as published in the 1884 volume known as Mansfield Digest, relating to chapter 91, entitled "Justices of the Peace." Sections 4016 through 4156, and these which were to regulate the jurisdiction and procedures before Justices of the Peace in the Indian territory. All right, so now we are out of 1890. That is basically the foundational bedrock law, that stands in place until November 16, 1907. So, in 1895 Congress again acts in a provision number 1, or section 1 of the Act of March 1, 1895. Congress reorganized those 3 divisions of the United States Court for the Indian territory, as follows: They reorganized division 1 into the United States Courts for Indian territory, northern district. They reorganize division 2 into the U.S District Court for the Indian Territory, central district, and they reorganized division 3 into the U.S. District Court, or the United States Court for the Indian Territory, southern district, and Congress further authorized under

section 4 of this same Act, that the judge of each judicial district they created, is to appoint the United States Commissioner, who functioned as a Justice of the Peace, as defined by the statutes of Arkansas. So, now prior to what happens next, is on January 18, 1898 while operating again under the Act of May 2, 1890, unquestionably, the indicated town of Tulsa, or I guess just the town of Tulsa at that point. But they were officially incorporated by the United States District Court, I believe for the northern district of Indian territory. And then thereafter, I believe was on March 31, Sapulpa was incorporated under the same law. Now we've reached June 28, 1898 and the provisions of section 14 of the Act of June 28, 1898, colloquially known as the Curtis Act. This was approved by the president of the United States on that date. Before that day, it didn't exist. Under the presentment clause, which I argue in the second motion. So when they create this, what it does is it permits mayors in towns of indian territory, incorporated under the provisions of section 14 of the Act of May 2, 1890, to have the same jurisdiction as United States commissioners over civil matters. So what happens next is in 1899, there is a group of lawyers out in indian territory, way back when and what they do is, they're like, we ought to put

together this book called the Annotated Statutes of the Indian Territory, embracing all of the laws in the general impermanent character, at the close of the section of the 55th Congress, which is July 8, 1898, right after the passage of section 14 of the Curtis Act. So what this did was, this book comprises all statutory law both criminal and civil, which was applicable in indian territory at that time. So in this book, that is annotated statutes of indian territory enforced, what they did was the sections with regard to Manfield's Digest at section 29, division 1 for Municipal corporations, they listed therein sections 492 to 727, with regard to the section as chapters 91 for Justices of the Peace. They called that chapter 41 section 2696 to 2836, and then with regard to the chapters on criminal law and criminal procedure, they renumbered those as chapters 19 and 20. For chapter 19 criminal law they named sections 834 to 1304. For chapter 20 of criminal procedure they renamed it from 1309 to 1819. This is very important for these cases I'm about to mention. So this happens. Next thing that happens is in 1902-

MRS. JOHNSON: Your Honor, I'm actually going to object and move to strike that entire reference about the Indian lawyers getting together and creating a book.

That has never been mentioned in any of the paperwork we have been given from the defense. This is the first I've heard of it.

THE COURT: Mr. Chapman, your response?

MR. CHAPMAN: My response is that I gave them copies, of Fortune v. Incorporated town of Wilburton. And when you look closely, it says indian territory annotated statutes, 1899 section 2825, so I'm clarifying that. Those were exhibits to the motion of my late filing.

THE COURT: Mrs. Johnson, any response?

MRS. JOHNSON: No.

THE COURT: All right. I'm going to grant it in part, and rule on it in part. I don't know who got together and made what, all I can tell you is what is on the case.

MR. CHAPMAN: The book exists.

THE COURT: The book exists. For the case, I will allow it as far as the history behind how all of that was made and done, it is not relevant, and I personally don't know how they did it. So you may proceed.

MR. CHAPMAN: The fact is that it exists. So next, to 1902. Under the Act of May 27, 1902 Congress again acts to reorganize the United States Court for the Indian Territory Northern District, by renaming it to the United States Court for the Western District. So, right

after this upon information and belief, we believe that the town- incorporated town of Wilberton was incorporated in June of 1902. This is important for the Fortune cases. They incorporated under provision of section 31 of the Act of May 2, 1890 as all incorporated towns did. So that brings us next, to the holdings in Fortune number 1 and Fortune number 2, which-

THE COURT: I don't mean to interrupt you, I have a question though. I want to make sure I've got this right. They were incorporated in 1902, correct?

MR. CHAPMAN: Yes, sir.

THE COURT: So that was after the passage of the Curtis Act?

MR. CHAPMAN: Very important, yes.

THE COURT: Okay, you may proceed.

MR. CHAPMAN: And thank you for pointing that out, it is very important because it is after the Curtis Act. So therefor any argument that it would apply to them, is very persuasive. So thereafter once they've formed as the court says in it's order, immediately after incorporation, they begin just kind of applying the same language, they were incorporated under the provisions of the Act of May 2, 1890 but after the Curtis Act and after incorporating, the incorporated town of Wilberton repeatedly passed and enforced ordnances. And pursuant

to those acts, they passed these ordnances, and one of which is mentioned in Fortune number 1. And in the case of Fortune number 1, if you give me just a second, I have a lot of notes here. Yes as I mentioned in my brief, one of those ordnances they passed was making it a violation of city ordnance for any person to be drunk and disorderly, within the corporate boundaries within the incorporated town of Wilberton. What they did was is that was punishable by fines. So sometime in early 1904, this black male named Robert Fortune, who as I mentioned was a Deputy United States Marshal. He was taken into custody by the incorporated town of Wilberton, by its Marshal on suspicion of being drunk and disorderly, in violation of that ordnance. So he was fined a total of 10 dollars at the time, and Mr. Fortune decided he wanted to appeal that. So the provisions under the laws that were enforced at the time, required of him to file an affidavit, or a notice under oath with the mayor's court or municipal court, whatever you want to call it. He had to put it on file there. He didn't do that, so this is very important. So he thinks he is appealing it. And so again as I mention in the brief too, under the act of-

THE COURT: Just if I might, for the record, if you will do me a favor this would be contained in what you

identified as a sur-reply. So just for the record, because you are jumping from both the motion to dismiss to the sur-reply, and we are all using the same term 'brief.' Just if you would be so kind, be specific and direct, which brief you are referring to. It will flow a little bit better when someone is looking at the record, and I think it would help me.

MR. CHAPMAN: And this is all mentioned in the corrected response filed on this date. It would bear the file stamp of today, so this first Fortune case is articulated therein, under paragraphs 4 through-

THE COURT: And just an FYI- don't mean to interrupt you again. The last one I have is the defendant's sur-reply June 10, 2022. I don't have- I have never been served a copy of the corrected one.

MR. CHAPMAN: I left a copy with you in your chambers.

THE COURT: What's your date?

MR. CHAPMAN: It's today's date.

THE COURT: I've got the one that's filed. I have a copy of one filed on June 10, I have a copy of another one filed on June 10, give me one second we will go off the record. Let me make sure it's still not sitting in there.

[BRIEFLY CHECKS CHAMBERS FOR COPY]

THE COURT: We are back on the record, Mr. Chapman I

located that additional copy. Can you just briefly, just to make sure I've got my reading down, what was corrected on it?

MR. CHAPMAN: The ordinals were incorrect. When I filed the original, I used like paragraphs 11 and 10, and I kept numbering them 10 and 12 for some reason.

THE COURT: So it was just a computer clerical error?

MR. CHAPMAN: Yes.

THE COURT: Okay, thank you.

MR. CHAPMAN: As I mentioned, they were somewhere I guess in paragraphs 4, through roughly 9 of this pleading on today's date, June 15th.

THE COURT: Thank you, sir. I didn't mean to interrupt, I just wanted to make sure I had the proper documentation.

MR. CHAPMAN: Absolutely. Okay so, I think I mentioned where Mr. Fortune failed to put on file the proper affidavit, pursuant to the law for his appeal. At a certain point, I think where I was at, was under the Act of 1895, which, let me get the exact date of this Act I already referenced it earlier. But under the 1895 Act, whenever Congress created new divisions they also created an appellate court for Indian territories, which was to serve as the highest appellant court in the territory, and it did. And so what Mr. Fortune did next,

was he goes to that court, and he tries to say you know, I want my trial de novo. And that's what they did on all of these mayor's court cases. They basically had two little trials, they had the initial mayor's court trial, and if you properly perfected your appeal, you have a second trial; a brand new trial before federal court. And so Mr. Fortune goes there saying hey, I want my trial de novo, and in the first Fortune case they say "Well, sorry you forgot to perfect your appeal." Because under the civil proceeding rules of which this is, you have to leave this on file with the mayor's court. So they issue this 1904 ruling, and one of the things I had intended to do, or I did therein. I'll get to that, actually strike that. They issue this ruling, and essentially what this stands for the proposition, is that they knew there had not been a criminal case in indian territory, that was heard by a court that was not the United States or Indigenous Court ever, they knew that. These were not treated as criminal cases, period. So after he loses in the Indian Territory Court of Appeals, he takes it up to the Eighth Circuit Court of Appeals, and this is Fortune number 2. The Eighth Circuit I believe met in like St. Louis. It was the general appellant circuit court for several states at that time, and indian territory. So again in that case,

they affirmed the decision of the Indian Territory Courts in that matter, and what they held expressly, and I should like to quote from this as it is in the case; "Under the Arkansas statutes enforced in the territory, appeals from municipal courts are taken in the same manor as from decisions of Justices of the Peace. An affidavit being prerequisite in civil, but not it in criminal cases. Fortune contends that the case against him was a criminal prosecution, both under the criminal principals of law, and under the controlling statutes of Arkansas. The offense of Fortune was not a statutory misdemeanor, but was merely a violation of local police regulation of the town. The complaint against him, which was framed in the language of the ordnance, would not have supported a conviction of any public offense under the statutes. The weight of authority, weight of authority, repeated, is such that an action is civil in character, and not criminal even though as in this case the penalty assessed is authorized to be enforced by the arrest and detention of the person, period. That is from the eighth circuit of Court of Appeals. So, it being well understood at the time that the violations of municipal ordnances are civil proceedings, let's continue on in our analysis. Next, Congress again acts June 16 of 1906. They pass what can be called or is

globally known as the Oklahoma Enabling Act. Preparing for the incorporation of indian territory into Oklahoma, and being admitted into a state. Therein, they provide for the transfer of cases from federal courts to state courts. It's important. I believe that is sections 13 and 16 through 17. Now, now we are up to the summer of 1906. So, upon information and belief, on December 1 of 1906 the town of Bixby incorporates in the same judicial district as the town of Tulsa did. December 1, 1906. So, they incorporate, great. Well the next year, as to quote the courts order, upon a corporation they immediately start passing and enforcing ordnances, and one of those ordnances they pass is ordnances number 5, and in this ordnance it is basically a violation of an occupation tax. So they haul in this woman, Mrs. Everts into the mayors court. And this is, gosh, let me get the exact dates here, for the record.

THE COURT: I've got on or about April 15, 1907.

MR. CHAPMAN: Yeah, so on April 15, 1907 they haul Mrs. Everts into the court of Bixby. They have a little trial or whatever, she is summarily found guilty of violating the ordnance, and she's assessed a fine. Okay so just like Mr. Fortune, Mrs. Everts is like, "I'm going to appeal this. I'm going to go to the federal court." I forget which district it is, I think the western

district of indian territory. "I'm going to go there and get my trial de novo." So she tries. She sends in a transcript to the western district, and gets a hearing date set, but importantly what she did not send to that Federal District Court for Indian Territory, was the requisite affirmation, oath as part of her appeal or civil proceedings. So they set a hearing on this, and so that hearing was on July 17, 1907. On that date, docket call, they call the case. No one answers by her name, no lawyer answers by her name. Well the lawyer for the incorporated town of Bixby is there, and of course he stands up and says "hey, I'm here." So he asks the federal court to dismiss Mrs. Everts appeal, for failure to prosecute it and to remand the case to the mayors court, so they can perfect their judgement against her. Granted. All right, so now we are to November 16, 1907. Very important date, Oklahoma becomes a state. All of that stuff in the Act of 1906, the so-called Oklahoma Enabling Act, they are for the transfer of cases from federal court in Indian territory, to state courts and to the Oklahoma Supreme Court. All of that stuff happens on that date, it all starts happening. Well, as I mentioned in my brief, I'm sorry in the corrected reply filed on this day June 15, beginning in Shaffer and its progeny, for the city arguing statehood did not

extinguish any powers or duties Congress granted Tulsa under the Curtis Act. However, it did limit what was previously unfettered criminal and civil jurisdiction of criminal and traffic proceedings. So on this date all of these transferences happen, and on this date the first session of the Oklahoma Legislature, they get together and begin the first session, and they start passing state laws. One of those laws they pass creates the Oklahoma Court of Criminal Appeals. Which, I don't think that was the exact correct name, but in early 1908 they passed that law, and created that. Provided for, by law- all right, so under the Enabling Act, all of these cases that went from federal court to the Supreme Court, we are now kicking all of the criminal cases to the court of crims. So the court of crims starts holding their sessions in 1908. Well this doesn't end our analysis, because Mrs. Everts, if you are living in the year of 1907, her case is still in the mayoral court level, it got remanded to the Mayors courts for judgement, and nothing happens. And then in 1908 the Oklahoma Supreme Court, they decide this case Baker v Markham and Tumor? ???the city cites this, and I believe this is even cited by the court under section 3. Every order you've made since Shaffer and its progeny standing on its proposition, in fact I will quote what's written.

THE COURT: One moment please, let me pull it up.
MR. CHAPMAN: I'm sorry, it's section 4, variously named I suppose. I will just reference the one in ours. So in the Stitt order dated April 22, 2022 the memorandum put in the order, the corrected one, there is a section, section 3. Portending to advise people challenging the lack of subject matter jurisdiction. They have an avenue to appeal, and this court mentions-
THE COURT: Just one moment. Did you just say pretending?
MR. CHAPMAN: Portending. So portending to advise as to an avenue to appeal. So what the quote writes is, based upon arguments made by The City in 1908, subsequent to the Missouri Kt vs. Phelps case. In 1908 the Oklahoma Supreme Court upheld the settled law, that under an appeal of the Curtis Act, would be heard in the United States District Court citing Baker v Markum and Tuner 1908. So let's get back to talking about Baker vs. Markham and Tumor. This case started off in the incorporated town of Muskogee, a civil proceeding as all mayoral court cases were. This civil proceeding sounded in contract. What happened in that case was that the Mayor found against one of the parties or another, one properly perfected their appeal, and so when they perfected their appeal, the federal district court held

a trial de novo. Brand new trial, as required by the well held principal that these are civil proceedings. And at the trial de novo, the federal court held, they agreed with the mayor's court whoever lost the case they affirmed the judgement. So this person, clearly being upset they keep losing, now we are into statehood. None of these courts- the federal court still exists obviously, but the mayor's court does not. So in Markham, this 1908 case, it goes to the Oklahoma U.S. Supreme Court. Why is that? That's because under the Enabling Act, and all of the other cases under that, they assumed jurisdiction. They didn't go to no federal court. So the Oklahoma Supreme Court in that case, ruled on that. And it doesn't matter what they ruled, it matters where it went, and it went to the Oklahoma Supreme Court. A mayor's court coming from a federal court, if this statement is true about avenues to appeal to a district court, that's where it would go. But, moving on. So Mrs. Everts, again if we are alive in 1908, she still has not perfected her appeal she is still in mayor's court for her judgement. So sometime in 1909, she decides, evidently that she wants to finally challenge this. And so, if this statement is true, that defendants have an avenue to appeal to a federal district court, her case is in the mayor's court it was

remanded. And if it was a criminal case, it would have went to the court of crims. But again, in the case of Everts v Bixby, it goes to the Oklahoma Supreme Court because it is a civil case, it is a civil proceeding. And they reaffirm everything from both Fortune cases, that it's civil proceedings. And, in that case I want to read a very relevant paragraph for the appellate court. 1908 Oklahoma Supreme Court in the Everts case held, the first 3 contentions by Mrs. Evert, made in support of her specifications that in fact the action was a criminal prosecution, and that neither of the mayors or the district court had any jurisdiction, the Oklahoma Supreme Court held, but that question is not properly raised here, nor is it a essentially a determination of this appeal to pass. However, the case of Fortune v incorporated town of Wilberton, 5 Indian territory 251-82 SW7 38. A controlling case has expressly decided that a prosecution for a violation of a town ordnances is a civil, civil, and not a criminal action. It can't be expressed in more plain English. Congress, again as the city has stated into existence starting in Shaffer, Congress didn't grant them unfettered criminal jurisdiction. Congress didn't even expressly grant them criminal subject matter jurisdiction as they claim. All of these cases stand for the proposition that, no they

did not. And now finally, I want to reference, again, I've always said the Act of May 2, 1890 is so important. There is a section in here, and I want to express it for the appellate courts. Section 32, at the end of it: "But all prosecutions therein," speaking of the Indian territory, "shall run in the name of the United States." Period. That is a criminal prosecution. 1890, nothing in there, Curtis Act or magical Curtis Act never overruled as much as everyone wants to say gotcha, never been overruled. No one can show me that this has ever been overruled, and this Act is controlling. You can't just pretend that it doesn't exist. They are saying right here, that United States of America has criminal prosecution, not some mayor's court. Look at all of the cases that come after, it's civil, it couldn't be stated in more plain english, and moreover, they are from the same progeny that the city keeps citing. Like Barkham is directly related, so these apply. And then at the hearing the first time, again I will swing back to this where I reference the case. I believe the case was in Ray Monroe 1917 OKCR 14. I think I even introduced a copy to the court on that date. I also spoke about a headline that said "the police court was abrogated by a decision habeas corpus writ in district court" based up on the Monroe case. What these cases stand for the

is, is that criminal jurisdiction was given to the municipal courts for the first time after the incorporation of the indian territory into Oklahoma. And then they lost it, because this finding, this little scheme they had of basically saying, okay well if you can't pay this fine, we will put you in jail. Court of crims found you have to give everybody a jury trial if it is criminal. It is our contention, period, that Congress in fact did not expressly grant criminal subject matter jurisdiction under the section 14 of the Act of June 28, 1898 to incorporated towns. According to their claims that they have exercised ever since, because in fact, the record shows that they never exercised it from the entire territorial period. And so we had a brief discussion in chambers, about the corrected response filed on this date June 15, in which I talk a lot about the importance of controlling authority. These are controlling cases, these are out of the Oklahoma Supreme Court. There's no- I'm just putting them on notice that these cases exist, and they're very important. You know, I'm not accusing anyone of anything, I don't know why it happened, I don't care. I'm just saying these cases exist, and they stand for a proposition that is directly contrary to the one they have been making. Again, the nature of controlling cases

in the jurisdiction also came up in my second motion to dismiss, when I was citing the Sapulpa vs. Tulsa cases and they were misrepresented. I don't know how, I don't care how, doesn't matter. They were stated, that I said they were both tribal court decisions. So, I think the nature of controlling authority is so critical, of paramount importance in this, and as the court said, or you know, chastise me for not recognizing or referencing the Hooper decision. Well, our first brief, written before Hooper. Our hearing, before Hooper. The Court's order came out a week after Mr. Hooper's case. We fully recognize-

THE COURT: I will stop you right there and then let you make your record. Number one, I have not in open court chastised you or anybody else. What I have presented at the pretrial hearing conference, was that I believe it is required by Oklahoma Bar Association, rule of professional conduct, to report to a court contradicting authority, and if you have a reason why that should be- why this case deviates from that authority, then it needs to be presented to the court. Okay? I did it in chambers, out of curtesy to everybody. Because I also commented about some other matters, where I wanted us to have a very professional, and efficient, and expedited hearing, right? Because this is very

passionate, passionate people. Smart lawyers that are very passionate about their positions, and I just want to make sure that we move forward.

MR. CHAPMAN: Can I continue?

THE COURT: So absent your presentation, Mr. Chapman, just now, that would have not have been presented in this particular record, it would have only been brought up in the pre-hearing conference.

MR. CHAPMAN: Well I'm addressing- if I could continue making the record, please. I'm almost done.

THE COURT: You may.

MR. CHAPMAN: So, I want to acknowledge that case, but I want to note that I did bring it to this court's attention, because in my second motion to dismiss, I cite the Hooper order that you issued.

THE COURT: Mr., Chapman, did you cite the Northern District of Oklahoma, City of Tulsa vs. Hooper case? Yes or no, and the ruling from the presiding judge of New Mexico, in that opinion? In either one, all 3 of your filings, did you file it? Yes or no?

MR. CHAPMAN: No. Can I continue my record?

THE COURT: You may proceed.

MR. CHAPMAN: And for the appellate court reading this, what I would say is, is that I believe it is my contention, that these two cases that were not presented

to the federal court that are controlling, would probably have effected their opinion. I don't know that, but that is my position. But we are not going to that court though, contrary to what this courts orders are with regard to telling defendants challenging subject matter jurisdiction, they have to go to federal court. We are going to the Oklahoma Court of Criminal Appeals, so I think it is important for them to know that. And again, finally to close it all out, counsel is very dispassionate about this I am arguing straight on the merits of the law. I went through in gross detail, in chronological order, all of the law. So I would stand on the 3 motions to dismiss. I would stand on the one-

THE COURT: I need to make the record clear, sir. There is a motion to dismiss, the first one, which was denied. There is a second motion to dismiss. There is a second motion to dismiss, I do not have 3.

MR. CHAPMAN: I stand on the arguments made in the first one that were not addressed at all in the first order, with regard to the temporal nature of the Act of May 2, 1890.

THE COURT: That is presented in your second motion, as I recall.

MR. CHAPMAN: And the first one. I said it was a temporary measure, so I stand on that. And then I stand

on the second brief, and I stand on the corrected response filed on this date of June 15, 2022.

THE COURT: All right, anything else sir?

MR. CHAPMAN: No, sir.

THE COURT: All right, Mrs. Johnson?

MRS. JOHNSON: May it please the court, counsel, I think the issue here is that the defendant wants to pick a place in time, and freeze the world. However, as noted by the argument here today, that date of freezing changes in whatever way it has to, to help the defendant. Hooper, the northern district Hooper case controls here. Virtually every argument that was made, was addressed by Hooper. It is controlling case law, it is a federal district court's interpretation of a federal statute to wit the Curtis Act of 1898. I will first make our very brief argument, and then address the issues raised today by defense counsel. Again, our position is that Hooper controls. That court found that there have been no changes to section 14 jurisdiction due to statehood, which is basically what defense counsel argues as far as the temporal issue. The Court specifically found that, and I would quote The Court at page 4 of the decision. The Court found that quote: "Statehood did not terminate the continued powers of municipalities to operate municipal courts. Oklahoma

statehood did not put an end to municipalities powers, under the Curtis Act." End quote. The Court also noted that the Curtis Act gave mayors the same jurisdiction, in all civil and criminal cases arising within the corporate limits, and specifically noted that in chapter 29 of the Mansfield's Digest, otherwise known as Arkansas law, that it applies to municipalities, including the authority to prosecute misdemeanors, and to enforce municipal ordnances. It gave the authority to mayors, to enforce criminal laws of the state, in addition to ordnances. And that was recognized in the Hooper case. The city was incorporated, prior to the passage of the Curtis Act by a few months, I believe it was. However, the Curtis Act specifically states, which you have to read the entirety of the statute, and not leave out sections which is what the defense is doing. It specifically states that cities of more than 200 people can go incorporate, quote "if not already incorporated thereunder," in reference to the Arkansas laws in Mansfield's Digest. The City of Tulsa did that. We have provided the incorporation papers, that were filed with the federal district court as required by the Curtis Act, and not only the case that was cited in reference to Oklahoma Natural Gas, but also the Hooper Court, have both agreed that the city incorporated

thereunder, in reference to the Curtis Act. So the Curtis Act does apply to the City of Tulsa as your Honor has found previously, and the important part is nothing has repealed section 14, and only Congress can repeal it. The City doesn't argue that it can never be changed, but it has not been changed. There has not been a repeal by Congress of section 14, and this argument, that subject matter jurisdiction was not provided to The City, is contrary to the plain language of the Curtis Act. Which specifically- I'm not going to read the entirety of the section 14, because the court is well aware and it's in the briefs of The City. But it specifically states that if you are already incorporated under the Mansfield Digest, then such cities, when so authorized and organized, shall possess all of the powers and exercise all the rights of similar municipalities in said State of Arkansas, and goes on to state, quote "That mayors of such cities and towns, in addition to their other powers, shall have the same jurisdiction in all civil and criminal cases, arising within the corporate limits of such cities and towns, as in coextensive with the United States Commissioners in Indian territory." So with that being said, although defense cites some cases about municipal ordnances being civil in nature, the Curtis Act did provide, and the

sections of Mansfield's Digest that I filed with the court today in what is now considered, I believe our sur-reply to the defendants reply-

THE COURT: It's marked in the record ma'am as a reply to the defendants sur-reply, correct?

MRS. JOHNSON: Correct, and it was filed today. I included sections from chapter 29 that was put into effect under not just the 1890 Act, but also in the Curtis Act, because its powers of the city. It is very clear that mayors are given jurisdiction over criminal cases. It is in I believe section 810 that I have attached as an exhibit, and also another section. Says the Mayor shall have power- I'm sorry that was the wrong one. Section 810 says the mayor, police or watchmen of the city may upon view, arrest any person that may be guilty of a breach of an ordnance, and then in the sections prior to that which is section 797, the mayor shall have the same power as a justice of the peace, in all matters civil or criminal, under the laws of the state. So even if an ordnances were a civil issue, the mayors were also given the power to enforce criminal state law under Mansfield's Digest, which was incorporated to the City of Tulsa via the Curtis Act. So this argument that there was no criminal jurisdiction in the city, is inaccurate. In the second motion to dismiss

by defendant, a couple of utility cases are cited, and they are both Oklahoma Natural Gas I believe, and in response to those cases, what defense leaves out, is that specifically in the constitution of the State of Oklahoma, municipalities ability to regulate various utilities was reduced. Some of the regulation was left in the hands of The City, other parts were taken away from The City in the constitution, and that is true. However, the constitution specifically preserved municipal court jurisdiction, and the powers of the municipalities that are not otherwise removed. Because the constitution saved the municipal court jurisdiction, those cases regarding utility regulation are not on point, because it's a completely different situation. They were not saved- the utility regulation powers were not saved by the constitution, but the court powers were. In I think we are calling it the reply, but it's listed as the sur-reply of the defendant, with the cases cited arguing that ordnances are civil only and therefore there is no jurisdiction, if we want to freeze everything in time in 1902, 3, 4, 5, that would be controlling case law as alleged by the defense. However, there have been subsequent cases, subsequent statutes that say that is no longer true. There is a statute from 1910 is that defines what a crime is, and says if there

is a statute that prescribes behavior, either acts or omissions, and that includes a fine, that is a criminal statute or ordnance. Defense fails to, you know, wants to stop before that statute was written and act as though everything is still civil in nature. I would note too that many defendants arguments made in both their second motion to dismiss, and in their improperly titled sur-reply that is the reply, are addressed in The City's response to their first motion to dismiss. So we had discussed all of that back before your original ruling in this case. I want to make sure I didn't miss anything. In reference to also the, I'm just going to call them the civil ordnance cases for lack of a better term. As a group, those cases, I don't see anywhere in these cases, I don't know that they filed in conformance with the Curtis Act or not. They would have had to go and file their paperwork in the districts, and I don't know the answer to that question Your Honor, but I would note that in the Fortune v incorporated town of Wilburton. Eighth circuit decision, the court specifically says: "The mayor is invested with a dual jurisdiction. There may be tried before him, not only cases involving infractions of the local ordnances, but also cases involving the criminal laws of the state. Again, his jurisdiction extends not only to crimes and

punishments, but also civil rights and remedies." As far as the Baker vs. Markham case, it also notes that a city and mayor have jurisdiction in both civil and criminal cases as well, and then, although again defendant attempts to argue that the 1890 Act language, that all prosecutions must be in the name of United States, and says that has not been repealed, and that is inaccurate. When there has been subsequent legislation relating to the same issue by the same government, which occurred in the Curtis Act, and the Curtis Act gives jurisdiction to municipalities to make laws, and then gives jurisdiction to the mayor to enforce those laws, that is in conflict with the 1890 Act, and therefor, it amends that at the very least. It doesn't appear to be a complete repeal, but it allows for The City to also have criminal jurisdiction. It's very clear, I mean it's in the plain language of the Curtis Act. So, I don't know that anyone can argue that the 1890 Act has not been amended. And with that Your Honor, The City does not, like I said, does not argue that its jurisdiction over Indians can never be amended or changed, but it hasn't been, and the Hooper case in the federal district court ruled in conformity with that argument that the city has made, and I don't think anything that the defense has cited would change what the court has found.

THE COURT: Anything else, ma'am?

MRS. JOHNSON: No.

THE COURT: Mr. Chapman, would you like a brief reply, sir?

MR. CHAPMAN: No sir, that's not necessary. The court can move on.

THE COURT: I will take 5 minutes folks, I will be right back. I'm going to take this under advisement for a moment. Take a recess, stretch your legs, and when we come back we will have to figure out if we have anything else we have left to do.

{BRIEF RECESS IN CHAMBERS}

THE COURT: All right, we are back on the record in City of Tulsa vs. Marvin Keith Stitt, 7569655. On the defendants- let me get the exact terminology here. On the defendants second motion to dismiss in brief and support in request for court or specific findings, the court finds as follows: That the defendants motion to dismiss is denied, and the request for specific findings is denied. This court is going to find that there is controlling authority out there in City of Tulsa vs. Justin Hooper. Correction, Justin Hooper v City of Tulsa, that is case number 21-CV-165-WPJ-JMJ in the United States Northern District of Oklahoma. That order was rendered by a federal, I believe the presiding judge

of the Federal District Court of New Mexico, William P. Johnson. And I will have an order by the end of the evening, and yes I will check the caption folks to make sure the spelling is right on the caption, and that will be hopefully done by the end of this evening. That leaves, and I will note the defendants objection to my ruling, correct Mr. Chapman?

MR. CHAPMAN: Yes, sir.

THE COURT: That leaves a couple of things. I believe there is a defendants motion for specific discovery. We talked about that at the prehearing conference we had today. That has been worked out or being worked out, is that right?

MR. KHALAF: Yes, sir.

THE COURT: Do I have any issue with that at this particular time? Are there any issues or orders, anything we need?

MR. KHALAF: No, sir.

THE COURT: I will show that matter be stricken, essentially?

MR. KHALAF: Probably just reserve it.

THE COURT: So I will reserve it, as you all are trying to settle it out. At least the issues contained therein. Then that leaves the final matter, which is the motion to amend information filed on May 9, 2022 by the

City of Tulsa. Did you file a response to that?

MR. KHALAF: We have not, sir.

THE COURT: Mr. Hall, are you arguing this one?

MR. HALL: Yes, there are two things we are trying to do. One, we are trying to amend the information to conform to the evidence. So the citation was written as 70 in a 50. Specific facts clearly state on the face of the citation it was actually 78 in a 50. So one, The City is moving to amend the face of the citation to 78 in a 50, we're also moving to amend the citation from citation, to an actual formal information in this case. We've provided a copy of that information for Your Honor to review.

THE COURT: You just said you had a copy? Copy was attached to the filing. Have you received a copy, sir?

MR. KHALAF: Yes sir, we received a copy of the motion. We object to an amendment, Judge. This case is obviously centered around a jurisdictional issue not around a speeding issue, and Mr. Stitt could have paid the fine on the citation that he was given, but given the fact that he is a recognized member of a recognized tribe, our client essentially wants to ensure that his fine goes to the right place. And so, instead of it being a fine only, now with the amendment, it's essentially him being punished for challenging

jurisdiction with a charge that carries what I would consider to be significant jail time, and so we would object to any type of amendment in this case.

MR. HALL: Your Honor, Title 22 Section 304 of the Oklahoma Statutes gives the city the right to amend a charge any time, without leave of court prior to a plea by the defendant. We're under the understanding that this case is moving forward to trial, we often do this if we have a citation that is- officer gave somebody a break, wrote them for going 70 in a 50, on a non-jailable offense carries up to a 500 dollar fine. Often our course is to move to amend, in order to try the case under the actual facts. That's what we're doing here in this case. It moves us from a non-jailable simple speeding, to an aggravated speeding. That's what the facts are in this case, and if we're moving to trial, City is moving forward under the actual facts alleged.

THE COURT: Mr. Khalaf, did you have something else?

MR. KHALAF: Well your Honor, this has been presented, and we are not here to contest whether or not Mr. Stitt was speeding, we are here to contest jurisdiction. Mr. Stitt was travelling over the posted speed limit, and now because he chose to exercise a constitutional right on challenging jurisdiction, it went from a non-jailable

offense, to what the city is hoping to be a jailable offense, which would significantly impact his ability to make a determination as far as how he would like to proceed on the case. Because at the end of the day it's not about evading accountability, it is ensuring that accountability is held in the proper location.

THE COURT: It's your motion Mr. Hall, I will let you give the last bat. I gave Mr. Khalaf an extra. It has been a long day.

MR. HALL: Your Honor, their briefs and their arguments today, there has been an argument that anything that is non-jailable is civil in nature. Our amendment to amend this charge to something that would be jailable in nature, that is clearly a crime, I think that is important based on the arguments they've made. That if they are making that argument, we are clearly amending this to something that is a crime under their arguments. Again, we have every right under Oklahoma Statutes to amend this charge to conform to the evidence.

THE COURT: That is Title 22-

MR. HALL: Section 304.

THE COURT: I just want to make sure I remember it as I remember it. All right, the- I'm not going to cite all of the cases, but these matters can be amended up to and

including during trial. Everybody knew, I think this has been discussed as far as what the actual basis was for the stop, and it's contained in the specific facts. I don't know why The City does this. I will note, I mean I have seen this before where before they go to trial they amend what they believe to be the actual factual basis. I can't speak to the intent or what have you, I just know this is consistent with what they do when folks challenge the preset. Your motion to amend the information is granted, and the proposed order is signed, Mr. Hall. If you will file this Mr. Hall, and see that everybody gets a copy I would appreciate it. I believe that settles everything, is that correct?

MR. KHALAF: Yes, sir.

THE COURT: All right, excellent job everybody, I will try to get that order out like I normally do. I will send it out electronically. It might be too late with staffing issues, and it may be tomorrow morning, but it will be out in the next 24 hours for sure. I will note the defendants objection to the motion to amend the criminal information, correct Mr. Chapman?

MR. CHAPMAN: Yes, sir. And then I think we are set again, what was our date?

THE COURT: July 1 is jury trial sounding docket. That is a good comment, do we need to remain on the

record? I have noted all of your objections to my rulings. Anybody else need anything on the record?

MRS. JOHNSON: No.

END OF PROCEEDINGS

CERTIFICATE

I, LAUREN KINNEBREW, Official Shorthand Reporter for the City of Tulsa, County of Tulsa, of the State of Oklahoma, do hereby certify that on the 15 day Of June, 2022, I reported in stenotype the proceedings had in the case of the City of Tulsa versus Marvin Keith Stitt, Ticket No. 7569655, and that my stenotype notes thereafter were transcribed by name and reduced to typewritten form as the same appears herein. I further certify that the preceding pages contains a full, true, and correct transcript of the proceedings at such time and place, WITNESS my hand this 10 day of January, 2023.

LAUREN KINNEBREW

Court Reporter

C E R T I F I C A T E

I, Mitchell McCune, Judge of Municipal criminal Court of Tulsa, Tulsa County, State of Oklahoma, do hereby certify that the foregoing was presented to me in the Ticket No. 7569655, The City of Tulsa versus Marvin Keith Stitt, and I now sign the same as true, and correct, and request that it be attested and filed by the Court Clerk. WITNESS my hand this 10 day of Jan., 2023.

JUDGE MITCHELL MCCUNE

114 F. 623
Circuit Court of Appeals, Eighth Circuit.

DENNEE et al.

v.

CROMER.

No. 1,604.
|
March 10, 1902.

Synopsis

In Error to the United States Court of Appeals in the Indian Territory.

West Headnotes (1)

[1] **Justices of the Peace** Statutory Provisions

Under Act Cong. June 28, 1898, 30 Stat. 499, c. 517, § 14, putting in force in the Indian Territory Mansf.Dig.Ark. c. 29, for the organization and government of cities and towns, and giving to mayors the same jurisdiction as United States commissioners have in such territory, which, under Act Cong. May 2, 1890, 26 Stat. 98, c. 182, § 39, is that of a justice of the peace under Mansf.Dig.Ark. c. 91, and declaring that "for the purposes of this section all the laws of Arkansas herein referred to, so far as applicable, are hereby put in force in said territory," appeals lie from the mayor in said territory; Mansf.Dig.Ark. c. 29, § 797, providing appeals may be taken from a mayor as from a justice of the peace.

***623** This action was brought by M.G. Cromer, the defendant in error, against Stewart Dennee and John S. Hammer, the plaintiffs in error, before the mayor of Ardmore, in the Indian Territory, on a promissory note for $150. In that court the plaintiff recovered judgment for the amount of the note and interest, from which judgment the defendants appealed to the United States court for the Southern district of the Indian Territory, at Ardmore, where the like judgment was rendered, from which an appeal was taken by the defendants to the United States court of appeals for the Indian Territory, which court affirmed the judgment of the lower court, and thereupon the defendants sued out this writ of error. In the United States court the defendants ***624** filed what in the pleading itself is called a 'demurrer to the proceedings' and in the record a 'demurrer in the nature of a plea to the jurisdiction.' The principal ground of this demurrer, and the only one necessary to notice, is 'that the judgment appealed from is absolutely void, because the mayors of cities and towns in the Indian Territory are without jurisdiction to render judgment in civil cases.' The court overruled the demurrer, and the exception to this ruling is the only question the record presents for our consideration.

Attorneys and Law Firms

Joseph G. Ralls, for plaintiffs in error.

W. A. Ledbetter and S. T. Bledsoe, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

Opinion

CALDWELL, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The contention of the plaintiffs in error is that the act of congress conferring on mayors of cities and towns in the Indian Territory jurisdiction to try civil actions at law where the amount in controversy exceeds $20 makes no provision for allowing, and does not allow, an appeal in such cases to a court of record, and that, for this reason, it is unconstitutional, and mayors have no jurisdiction of such cases, and their judgments are void.

The action of the plaintiffs in error is not consistent with their contention; for, while contending the act of congress allows no appeal from the judgment of a mayor of a city or town, they have taken an appeal from the judgment of a mayor, and have prosecuted it through three courts. If the law allowed them no appeal, their appeal would give them no standing in an appellate court, which could do no more than dismiss the unauthorized appeal, not the suit, and leave the parties where they stood before such appeal was taken. If the law allowed them no appeal, they plainly mistook their remedy. Since the judgment of the supreme court in the case of Traction Co. v. Hof, 174 U.S.I, 19 Sup.Ct. 580, 43 L.Ed.

873, it must be accepted as law in the courts of the United States that under the seventh amendment to the constitution of the United States the parties to suits at common law, where the value in controversy exceeds $20, are entitled to a trial by jury, and that a trial by jury, within the meaning of the constitution, is not merely a trail by a jury of 12 men before a justice of the peace 'vested with authority to cause them to be summoned and impaneled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence.' It is, nevertheless, competent for congress, when invested with the power of legislation over a district or territory, to provide for the trial of civil cases by a justice of the peace, or in his presence, by a jury of 12 or any less number, allowing to either party, where the value in controversy exceeds $20, the right of appeal from the judgment of the justice of the peace to a court of record and to have a trial by jury in that court. While a trial ***625** by jury of 12 or any less number before a justice of the peace is not, and a trial by jury in an appellate court is, a trial by jury, within the meaning of the common law and the seventh amendment to the constitution, the constitutional right of trial by jury is not infringed if only the right of appeal is allowed from the judgment of the justice of the peace to a court of record where such a trial by jury as the constitution contemplates can be had.

That the right of appeal from the judgments of mayors in the Indian Territory to the United States court is given in all civil cases cognizable before such magistrate where the amount in controversy exceeds $20 will clearly appear by a brief reference to the acts of congress relating to the subject. There are no justices of the peace in the Indian Territory by that name. The Territory is not, however, without these important and indispensable officers. They are there under other names. In that Territory the United States commissioners and mayors of cities and towns are invested with the jurisdiction and powers of justices of the peace within their respective territorial jurisdictions. The act of congress approved May 2, 1890 (26 Stat. 98, c. 182, Sec. 39), adopted and put in force in the Indian Territory chapter, 91 of Mansfield's Digest of the Statutes of Arkansas defining and regulating the jurisdiction and powers of justices of the peace and the practice and mode of proceeding in justices' courts. This chapter confers jurisdiction on justices of the peace in matters of contract where the amount in controversy does not exceed $300, and provides for appeals from their judgments to the circuit court and for a trial by jury on the merits in that court. The act of congress invested United States commissioners in the Indian Territory with all the powers and jurisdiction conferred on justices of the peace in Arkansas by this chapter, and provides that 'appeals may be taken from the final judgment of said commissioners to the United States court in said Indian Territory in all cases and in the same manner that appeals may be taken from the final judgments of justices of the peace under the provisions of said chapter 91.' By act of congress approved March 1, 1895 (28 Stat. 695, c. 145, Sec. 4), this provision was, in substance, re-enacted, with a proviso that no appeal shall be allowed in civil cases where the amount of the judgment, exclusive of cost, does not exceed $20. The act of congress approved June 28, 1898 (30 Stat. 499, c. 517, Sec. 14), adopted and put in force in the Indian Territory chapter 29 of Mansfield's Digest of the Statutes of Arkansas relating to the incorporation of cities and towns, and provided that the cities and towns organized thereunder should possess all the powers and exercise all the rights of cities and towns in Arkansas, and in terms provides 'that mayors of such cities and towns, in addition to their other powers, shall have the same jurisdiction in all civil and criminal cases arising within the corporate limits of such cities and towns as, and coextensive with, United States commissioners in the Indian Territory. ' Another clause of this same section declares, 'For the purposes of this section all the laws of said state of Arkansas herein referred to, so far as applicable, are hereby put in force in said Territory.'

***626** Chapter 29 of Mansfield's Digest is not only referred to in 'this section,' but is actually adopted and put in force for the organization and government of cities and towns in the Indian Territory. Beyond question, this section adopted and put in force in the Indian Territory all the provisions of chapter 29 of Mansfield's Digest, 'so far as applicable.'

Now, among the provisions of chapter 29 of the Arkansas statute thus adopted is the following:

'Sec. 797. The mayor of the corporation shall be a conservator of the peace throughout its limits, and shall have within the same all the power and jurisdiction of a justice of the peace in all matters, civil or criminal, arising under the laws of the state, to all intents and purposes whatever; and appeals may be taken in the same manner as from decisions of justices of the peace.'

Manifestly, the provision of this section allowing appeals from the judgments of mayors in the same manner as appeals from the justices of the peace is 'applicable' to mayors in the Indian Territory, and was adopted by section 14 of the act of congress. It was the intention of the act of congress to adopt every provision of chapter 29 of the Arkansas statutes not locally inapplicable or inconsistent with the provisions of the act of congress. The provision allowing appeals from the judgments of mayors is in harmony with the whole scheme of congressional legislation for the administration of justice in the Indian Territory. At the very beginning of legislation establishing courts in that Territory, congress adopted and put in force in the Territory the laws of Arkansas relating to the jurisdiction, pleadings, practice, and modes of proceeding in the courts in that state, from those of justices of the peace up to the supreme court. Where any change in those laws was necessary to meet the different conditions existing in the Indian Territory it was usually made by express exception or addition.

It is inconceivable that congress intended to impair the harmony and symmetry of this system of laws by denying an appeal from the judgment of a mayor when exercising the jurisdiction of a justice of the peace and allowing an appeal from the judgment of a United States commissioner when exercising precisely the same jurisdiction. No reason can be suggested for allowing the right in one case and denying it in the other.

When chapter 29 of Mansfield's Digest was adopted and put in force in the Indian Territory the provision of that chapter allowing appeals from the judgments of mayors was adopted and made applicable to the judgments of mayors in that Territory.

The judgment of the United States court of appeals in the Indian Territory, and the judgment of the United States for the Southern district of the Indian Territory, are each affirmed.

All Citations

114 F. 623, 52 C.C.A. 403

4 Ind.T. 706
Court of Appeals of Indian Territory.

MISSOURI, K. & T. RY. CO.

v.

PHELPS.

Sept. 23, 1903.

Synopsis

Appeal from the United States Court for the Central District of the Indian Territory; before Justice Clayton, September 23, 1901.

Action by Harvey Phelps against the Missouri, Kansas & Texas Railway Company. Judgment for plaintiff. Defendant appeals. Reversed.

This case has heretofore been decided in this court, sustaining the action of the court below in dismissing the appeal, following the case of Luce v. Garrett, 64 S. W. 613, and we are now asked to rehear the case, and are of opinion that the case ought to be reheard and redecided.

Statement of Case.

On May 9, 1901, the transcript of the mayor of the town of Caddo, Ind. T., was filed in this case, which transcript contained the complaint of plaintiff and answer of the defendant, summons, subpœna for witnesses, venire of the jury, verdict of the jury, judgments and proceedings before said mayor, and defendant's affidavit and bond for appeal. The complaint alleged that on March 17, 1901, the defendant, or defendant's employés, negligently and carelessly run over and killed one red heifer, the property of plaintiff, of the value of $18. Said heifer was negligently killed about one-half mile north of the station of the town of Caddo, and plaintiff asks judgment for $18 and costs. The answer denies all the allegations of the complaint, and says: "That, if said animal of the plaintiff was killed, it was not through any negligence or carelessness on the part of this defendant, or any of its agents, servants, or employés, but that the killing was solely due to the carelessness and negligence of the said plaintiff." The verdict in the transcript is as follows: "We, the jury impaneled and sworn in the above-styled case, find the issues in favor of the plaintiff, and assess his demages at $15." Upon which verdict the said mayor rendered judgment against defendant, and defendant appealed to the district court of the Central District. On September 11, 1901, in the district court, plaintiff moved to dismiss the said appeal as follows: "Motion to Dismiss. Comes now the plaintiff herein, Harvey Phelps, and moves the court to dismiss the appeal of the defendant, the Missouri, Kansas & Texas Railway Company, for the reason that the above-styled court has no jurisdiction of the said appeal, the amount in controversy and the judgment therein being the amount of only $15." On September 23, 1901, said motion to dismiss was sustained, from which decision of the court appeal was allowed and taken to this court.

West Headnotes (1)

[1] **Indians** Appeal or Other Review

Mansf.Dig. § 4134, Ind.T.Ann.St.1899, § 2814, providing for appeals from judgments of justices of the peace without reference to the amount of the judgment, obtains in the Indian Territory.

1 Cases that cite this headnote

Attorneys and Law Firms

***286** Clifford L. Jackson, for appellant.

Chas. E. McPherren, for appellee.

Opinion

GILL, C. J. (after stating the facts).

Appellant has filed two specifications of error, as follows: "(1) The court erred in sustaining the motion to dismiss the appeal in this case. (2) The court erred in dismissing the appeal from the mayor's court in this case." It is conceded by both appellant and appellee in this case, and it is the law, that mayors' courts and United States commissioners' courts were established in the Indian Territory by act of May 2, 1890, and given equally the jurisdiction of justices of the peace courts of Arkansas. Ind. T. Ann. St. 1899, p. 9, § 31; Id. p. 13, § 39; Id. p. 138, § 567; Act June 28, 1898, c. 517, § 14, 30 Stat. 499 (Ind. T. Ann. St. p. 31, § 57z4). The statute concerning appeals from United States commissioners' courts was adopted by Act Cong. March 1, 1895, c. 145, § 4, 28 Stat. 696 (Ind. T.

Ann. St. 1899, § 48), and reads as follows: "Appeals may be taken to the United States Court in the Indian Territory, in said districts, respectively, from the final judgment of said commissioners acting as justices of the peace, in all cases; and such appeals shall be taken in the manner that appeals may be taken from the final judgments of justices of the peace under the provisions of said chapter 91, in civil cases, and chapter 46, in criminal cases, of the Laws of Arkansas. Provided, that no appeal shall be allowed in civil cases where the amount of the judgment exclusive of costs does not exceed twenty dollars." Theretofore appeals lay as provided in Mansf. Dig. § 4134 (Ind. T. Ann. St. 1899, § 2814). Heretofore this court, in numerous cases, has passed upon this section of the statute, namely, in Hardware Co. v. Brittain, 48 S. W. 1067; Baldwin v. Farris, 51 S. W. 1077; Morrow v. Burney, Id. 1078; Butler v. Penn, 61 S. W. 987; and sustained the section and action of the lower court in dismissing appeals on the ground that the judgment did not exceed twenty dollars. In Luce v. Garrett, 64 S. W. 613, the holding theretofore by this court on said section was reversed on the ground that the act limiting the right of appeal in commissioners' courts to cases where the amount of the judgment does not exceed $20, exclusive of costs, is in violation of the Constitution of the United States. In this last case the action was brought for the sum of $98.85 on a debt arising out of contract. The verdict of the jury was in favor of the defendant. In the progress of the opinion, rendered by Judge Clayton, the following language is used: "But the statute of March 1, 1895, makes the amount of the judgment, and not the amount in controversy, as provided by the Constitution, the test. It is true that the Constitution makes the right of a trial by jury depend upon the amount in controversy, and the statute the right of an appeal to depend upon the amount of the judgment; but, inasmuch as, under the circumstances, a legal jury trial can only be obtained through an appeal, an appeal, if applied for, must in all cases be granted where the amount in controversy exceeds twenty dollars. If the statute is to be followed, then in all cases ***287** where the amount in controversy is more than twenty dollars and the judgment less than that amount the parties would be deprived of an important constitutional right, to wit, the rights of a trial by jury of a cause in which, by the Constitution, they are guarantied that right. It seems clear to us that the statute, in so far as it makes an appeal from a commissioner's court depend upon the amount of the judgment rather than the amount in controversy, is unconstitutional and void, and we so hold." See, also, Dennee v. McCoy, 69 S. W. 859. It will follow, then, that if the proviso of the statute which refuses to allow an appeal where the amount of the judgment, exclusive of costs, does not exceed $20, is unconstitutional and void, that then we are relegated at once to chapter 91 of Mansfield's Digest (chapter 41, Ind. T. Ann. St. 1899), regulating appeals from justices of the peace, containing no limitations whatever as to amount, whether of demand or judgment, and which reads as follows: "Any person aggrieved by any judgment rendered by a justice of the peace, except a judgment of dismissal for want of prosecution, may, in person or by his agent, take his appeal therefrom to the circuit court." Mansf. Dig. § 4134 (Ind. T. Ann. St. 1899, § 2814). Consequently, no amount whatever is fixed by law as limiting appeals from justices of the peace in Arkansas, and we are of opinion, and hold in this case, for the reasons assigned in Luce v. Garrett, supra, that the proviso to the act of March 1, 1895, limiting the right of appeal from commissioners' and mayors' courts, in civil cases, where the amount of judgment, exclusive of costs, does not exceed $20, is unconstitutional and void; and we are further of opinion and hold that section 4134, Mansf. Dig. (Ind. T. Ann. St. 1899, § 2814), providing for appeals from judgments of justices, without reference to the amount of judgment or amount in controversy, obtains and is the law in Indian Territory, and that the judgment of the court below in sustaining the motion to dismiss the appeal in this case is error, and should be reversed, and the case remanded, with directions to overrule the motion to dismiss the appeal, and allow it to proceed regularly upon its merits.

Reversed and remanded.

RAYMOND AND TOWNSEND, JJ., concur.

All Citations

4 Ind.T. 706, 76 S.W. 285

5 Ind.T. 251
Court of Appeals of Indian Territory.

FORTUNE

v.

INCORPORATED TOWN OF WILBURTON.

Oct. 19, 1904.

Synopsis

Appeal from the United States Court for the Central District of the Indian Territory; before Justice William H. H. Clayton, July 8, 1903.

Robert Fortune was convicted of being drunk and disorderly, and he appeals. Affirmed.

West Headnotes (3)

[1] **Justices of the Peace** Compelling Amendment or Transmission of Record

Where a justice's record was verified by his affidavit, defendant's unsupported motion to compel the justice to correct his record was insufficient to show that it was defective, within Ind.T.Ann.St.1899, § 2825, providing that, whenever the court is satisfied that the return of a justice is substantially defective, the court may, by rule in attachment, compel him to amend the same.

[2] **Municipal Corporations** Trial, Judgment, and Review

A prosecution for being drunk and disorderly in violation of an ordinance of an incorporated town is a civil proceeding, and the filing of the statutory affidavit is a condition precedent to defendant's appeal from a conviction therein.

2 Cases that cite this headnote

[3] **Municipal Corporations** Trial, Judgment, and Review

An affidavit for an appeal from a conviction for violation of a city ordinance must be filed with the justice before whom defendant was convicted, and not with the court to which the appeal was taken.

1 Cases that cite this headnote

Attorneys and Law Firms

***738** J. S. Arnote, for appellant.

Chas. H. Hudson and G. L. Andrews, for appellee.

Opinion

RAYMOND, C. J.

The appellant was arrested for being drunk and disorderly in violation of an ordinance of the incorporated town of Wilburton. He was fined, after trial, $10 and costs, and sought to bring the case to the United States District Court for review. The attorney for appellee moved the court to dismiss the appeal for the reason no affidavit of appeal was filed in the court below. Counsel for appellant contends that the prosecution for the violation of an ordinance of an incorporated town is a criminal and not a civil suit. and hence no affidavit for appeal was necessary. The court dismissed the appeal which was attempted to be taken, and appellant brings the cause here for review.

The first question presented is as to the character of the proceeding--civil or criminal. The great weight of authority in this country is to the effect that all prosecutions for the violation of ordinances are civil suits. “The best authority as to the character of an action under a municipal ordinance is found in those jurisdictions in which, following the common law, the courts regard the action as purely civil.” Ency. of Pleading & Practice, vol. 15, p. 413. “The weight of judicial authority declares that the prosecution is in the nature of a civil action for the recovery of a debt.” McQuillin, Municipal Ordinances, § 304. The Appellate Court of Illinois had occasion to pass upon this question recently in the appeal of the city of Chicago. One Kenney had been prosecuted for violating a city ordinance in relation to disorderly conduct, and was convicted before a justice of the peace, and appealed to the criminal court of Cook county. Judge Moran, in delivering the opinion of the court, says: “The fact that there is an arrest, either by warrant or on view, does not change

the proceeding from a civil to a criminal one. * * * The argument of the counsel that this cannot be treated as a civil proceeding, because, in order to sustain it as such, the provision of our Constitution forbidding imprisonment for debt would be violated, is without force. The debts intended to be embraced in that clause are those arising ex contractu. It does not include fines or penalties arising from violation of penal laws. Kennedy v. People, 122 Ill. 649, 13 N. E. 213, and cases there cited. The committal of the defendant until the fine is paid is necessary in such cases, and the power to do so indispensable to the safety of society, the preservation of good order, and the enforcement of the ordinances. Ex parte Bollig, 31 Ill. 88." City of Chicago v. Kenney, 35 Ill. App. 57. To the same effect are the decisions of the Supreme Court of Indiana. "It is well settled in this state that an action brought by a municipal corporation to enforce a penalty for a violation of an ordinance is essentially a civil action. In the case of City of Goshen v. Croxton, 34 Ind. 239, the court say: 'A suit before a mayor to recover a penalty for a violation of a city ordinance, although a warrant may be issued and served, is a civil suit, and the rules of practice in civil suits apply, and are to be observed by the court.' See, also, City of Greensburgh v. Corwin, 58 Ind. 519." City of Hammond v. N. Y. C. & St. L. Ry. Co. (Ind. App.) 31 N. E. 817. The Supreme Court of Missouri, in 1902, in deciding a similar point, came to the same conclusion. "Violations of municipal police regulations are not crimes, within the meaning of that term as used in the Constitution. Stevens v. City of Kansas City, 146 Mo. 460, 48 S. W. 658; State v. Renick, 157 Mo. 293, 57 S. W. 713. Being mere prosecutions to recover a penalty for a violation of a city ordinance, 'an arraignment and plea are unnecessary, since such a proceeding is not a criminal prosecution.' ***739** City of Lexington v. Curtin, 69 Mo. 626; City of St. Louis v. Knox, 74 Mo. 79. Ever since City of St. Louis v. Smith, 10 Mo. 439, such prosecutions have been treated by this court as civil in nature, although somewhat criminal in respect to some of the prescribed procedure. City of Kansas v. Clark, 68 Mo., loc. cit. 589; Ex parte Hollwedell, 74 Mo., loc. cit. 400; City of St. Louis v. Knox, 74 Mo. 79; City of St. Louis v. Weitzel, 130 Mo., loc. cit. 612, 31 S. W. 1045; City of Gallatin v. Tarwater, 143 Mo., loc. cit. 46, 44 S. W. 750; Stevens v. City of Kansas City, 146 Mo. 460, 48 S. W. 658; State v. Renick, 157 Mo. 293, 57 S. W. 713; State v. Muir (not yet officially reported) 65 S. W. 285." Delaney v. Police Court, 67 S. W. 589. "Fact that original writ shall be a capias, instead of a summons or notice, does not make proceedings criminal." In re Miller, 44 Mo. App. 125. "Notwithstanding the violation is quasi criminal, the penalty results from such violation. 'It is a sum of money due by reason thereof, and the remedy is strictly civil.' 'Is debt the proper form of action? If not, it is very clear there is no remedy. Assumpsit cannot be supported, for the want of a promise. Covenant will not lie, for there is no obligation under seal. Neither trespass nor case are any more appropriate. Debt is in fact the only form of action recognized by the principles of the common law for the recovery of fines, penalties, and forfeitures.' " Markle v. Akron, 14 Ohio, 586, 591, citing 1 Chitty, Pl. 101; Cincinnati v. Gwynne, 10 Ohio, 192. "Although act committed is a misdemeanor, the action is civil." Bristol v. Burrow, 5 Lea (73 Tenn.) 128. "Prosecutions for violations of ordinances are civil actions merely for the collection of forfeitures. Fact that action is in name of state does not make it criminal." Chafin v. Waukesha County, 62 Wis. 463, 467, 22 N. W. 732; State v. Smith, 52 Wis. 134, 8 N. W. 870; Sutton v. McConnell, 46 Wis. 269, 50 N. W. 414.

The statute in force here is as follows: "No appeal shall be allowed unless the following requisites shall be complied with: First. The applicant, or some person for him, shall make and file with the justice an affidavit that the appeal is not taken for the purpose of delay, but that justice may be done him." Ind. T. Ann. St. 1899, § 2815. It therefore must follow that, this being a civil cause, the affidavit as provided in the foregoing section must be filed in the court below. Looking at the transcript, it will be seen that no such affidavit was ever filed.

Counsel for appellant in the district court moved the court for leave to file an affidavit under the statute. This the court denied. The court was right. The affidavit must be filed "with the justice."

The appellant then filed the following motion: "Comes now the defendant, Robert Fortune, and moves the court for a rule on J. W. Wade, mayor of the town of Wilburton, Indian Territory, before whom this cause was tried, to complete and correct his record in this matter, and certify the same up to this court, in the following particulars, to wit: (1) To attach to his record the motion for a change of venue made and filed by the defendant. (2) To attach to his record the bail bond of the defendant, given for his appearance before the mayor. (3) That, if the judgment certified to this court was signed by the said mayor, then that he cause his certified copy of the judgment to show that fact; if it was not signed by said mayor, that he sign the same, and amend his certified judgment by attaching his signature to the same. (4) To show whether or not an appeal was prayed and allowed, and whether or not an affidavit was made for an appeal; if so, that the same be attached to his certified record; the record being silent as to the prayer and affidavit for appeal. (5) That if his record does not

show a prayer for an appeal nor affidavit of appeal, but either was made before him, then to correct his record to show that fact, and amend his certified record to this court accordingly. J. S. Arnote. Attorney for Defendant." The statute provides: "Whenever the court is satisfied that the return of the justice is substantially defective, the court may, by rule and attachment, compel him to amend the same." Ind. T. Ann. St. 1899, § 2825. Here is a bare statement of counsel, asking a rule against the court below to complete and correct his record, as against the certificate of a sworn officer that his record was correct. The statute provides that, whenever the court is satisfied that the return of the justice is substantially defective, the court may enter a rule against him to correct it. But surely no one will contend that the showing made by appellant in his unsupported motion was sufficient to satisfy the court that the return of a sworn officer was defective. The court was right in denying the motion.

The court is of opinion there is no error in the record, and the judgment is affirmed.

TOWNSEND and GILL, JJ., concur.

All Citations

5 Ind.T. 251, 82 S.W. 738, 5 Am.Ann.Cas. 287

142 F. 114
Circuit Court of Appeals, Eighth Circuit.

FORTUNE

v.

INCORPORATED TOWN OF WILBURTON.

No. 2,179.
|
October 17, 1905.

Synopsis

In Error to the United States Court of Appeals in the Indian Territory.

For opinion below, see 82 S.W. 738.

West Headnotes (2)

[1] **Courts** Requisites and Proceedings for Transfer of Cause

Under the provisions of Mansfield's Digest of Arkansas, in force in the Indian Territory, which confer on mayors of municipal corporations the powers of a justice of the peace, and provide that appeals from his decisions shall be taken in the same manner as from those of a justice, and which further require an affidavit to be filed on an appeal from a justice in civil cases, stating that the appeal is not taken for the purpose of delay, such an affidavit is essential to perfect an appeal from the judgment of a mayor's court imposing a fine for violation of an ordinance.

6 Cases that cite this headnote

[2] **Municipal Corporations** Nature of Proceeding

An action for violation of a town ordinance, although a fine may be imposed and enforced by imprisonment, is civil and not criminal in character.

7 Cases that cite this headnote

Attorneys and Law Firms

***114** James S. Arnote, for plaintiff in error.

Charles H. Hudson, for defendant in error.

Before VAN DEVANTER, HOOK, and ADAMS, Circuit Judges.

Opinion

HOOK, Circuit Judge.

Fortune was found guilty in the mayor's court of Wilburton, Ind. T., of the violation of a town ordinance, and sentenced to pay a fine of $10 and costs. His appeal to the United States Court for the Central District of Indian Territory was dismissed for the reason that the action was a civil one, and he had not perfected the appeal by filing an affidavit in the court of first instance to the effect that it was not taken for the purpose of delay, but that justice might be done him. The judgment of dismissal was affirmed by the United States Court of Appeals in the Indian Territory. 82 S.W. 738.

Under the Arkansas statutes in force in the territory, appeals from municipal courts are taken in the same manner as from decisions of justices of the peace; an affidavit being requisite in civil, but not in criminal, cases. Fortune contends that the case against him was a criminal prosecution, both under general principles of law and under the controlling statutes of Arkansas. The offense of Fortune was not a statutory misdemeanor, but was merely a violation of a local police regulation of the town. The complaint against him, which was framed in the language of the ordinance, would not have supported a conviction of any public offense under the statutes. The weight of authority is that such an action is civil in character, and not criminal, even though, as in this case, payment of the penalty assessed is authorized to be enforced by the arrest and detention of the person. McQuillan on Municipal Ordinances, Sec. 304; Dillon Municipal Corp. Secs. 411, 432; Williams v. Augusta, 4 Ga. 509; Shafer v. Mumma, 17 Md. 331, 79 Am.Dec. 656; Lewiston v. Proctor, 27 Ill. 414, 419; Quincy v. Ballance, 30 Ill. 185; Alton v. Kirsch, 68 Ill. 261; Tiedeman on Municipal Corp. Sec. 156; ***115** McGear v. Woodruff, 33 N.J.Law, 213, 217; Greensburgh v. Corwin, 58 Ind. 518; Hammond v. Ry. Co. (Ind. App.) 31 N.E. 817, 820; State v. Renick, 157 Mo. 292, 57 S.W. 713; St. Louis v. Knox, 74 Mo. 79; In re Miller, 44 Mo.App. 125; Bristol v. Burrow, 73 Tenn. 128; Chafin v.

Waukesha County, 62 Wis. 463, 467, 22 N.W. 732; Sutton v. McConnell, 46 Wis. 269, 50 N.W. 414.

With some exceptions, unnecessary to be noted, the civil and criminal procedure of Arkansas and the laws relating to municipal corporations and to the jurisdiction and procedure of justices of the peace in civil and criminal cases were put in force in the Indian Territory. Act May 2, 1890, c. 182, 26 Stat. 81; Act March 1, 1895, c. 145, 28 Stat. 693; Act June 28, 1898, c. 517, Sec. 14, 30 Stat. 499. A careful investigation has failed to disclose anything in these statutes that changes the prevailing doctrine as announced by the courts, or that prescribes for this particular class of cases a different procedure for appeals than obtains in civil actions generally. A section of the law relating to municipal corporations provides that the mayor shall be a conservator of the peace within the corporate limits, confers upon him all of the powers and jurisdiction of a justice of the peace in all matters, civil and criminal, arising under the laws of the state, imposes upon him the performance of all duties required of him by the municipal laws and ordinances, and further provides that appeals may be taken in the same manner as from decisions of justices of the peace. Mansf. Dig. Sec. 797 (Ind. T. Ann. St. 1899, Sec. 567).

It is contended on behalf of Fortune that another provision of the law, ‘that the procedure in circuit courts for the trial of criminal cases, so far as applicable, shall govern the proceedings of city and police courts‘ (Mansf. Dig. Sec. 2356 (Ind. T. Ann. St. 1899, Sec. 1699)), is a legislative recognition of the criminal character of a proceeding for the violation of an ordinance. Of course, the arrangement and distribution of legislative provisions, while proper for consideration, cannot change the essential character of an action. Moreover, the argument loses whatever significance it may apparently possess, when it is noted that the mayor is invested with a dual jurisdiction. There may be tried before him, not only cases involving infractions of the local ordinances, but also cases involving the criminal laws of the state. Again, his jurisdiction extends, not only to crimes and punishments, but also to civil rights and remedies. The adoption of the criminal procedure in the circuit courts was only so far as the same might be applicable, and it is evident that it was not the purpose thereby to change the nature of character of any cause that might be brought for trial before the mayor.

It is also contended that error was committed in denying Fortune's motion for an order requiring the mayor to send up a full and complete transcript of the proceedings, and also in the refusal of the Court of Appeals to permit an amendment of the bill of exceptions. But it is nowhere contended that an affidavit of appeal, such as is required in civil cases, was in fact filed, and, as we have found that such failure is fatal to the appeal, the other contentions just adverted to are immaterial and need not be considered.

The judgment is affirmed.

All Citations

142 F. 114, 4 L.R.A.N.S. 782, 73 C.C.A. 338, 6 Am.Ann.Cas. 565

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22 Okla. 21
Supreme Court of Oklahoma.

BAKER
v.
MARCUM & TOOMER.

Sept. 10, 1908.

Syllabus by the Court.

Mayors of incorporated towns and cities in the Indian Territory, under section 57z4, Ind. T. Ann. St. 1899, had jurisdiction in all civil cases arising within the corporate limits of such cities and towns, coextensive with the jurisdiction of United States commissioners.

An appeal from the mayor's court of an incorporated town or city in the Indian Territory could be taken to the United States Court for the district in which the mayor's court was situated.

This court will not consider questions that do not go to the jurisdiction of the trial court that are raised for the first time in this court.

[Ed. Note.-For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1018.]

Synopsis
Error from the United States Court for the Western District of the Indian Territory, Sitting at Muskogee; Wm. R. Lawrence, Judge.

Action by Marcum & Toomer against H. G. Baker. From a judgment for plaintiffs, defendant brings error. Affirmed.

This is an action ex contractu, brought in the mayor's court of the city of Muskogee, in which court judgment for the sum of $200 was obtained in favor of defendants in error, hereinafter called "plaintiffs," against the plaintiff in error, hereinafter called "defendant." From the judgment of the mayor's court appeal was taken to the United States Court for the Western District of the Indian Territory at Muskogee, in which court the case was tried de novo, and judgment again rendered in favor of plaintiffs. From this judgment appeal was taken to the United States Court of Appeals of the Indian Territory at South McAlester, and the case is now before this court for final disposition under the provisions of the Enabling Act.

West Headnotes (1)

[1] **Appeal and Error** Necessity of Presentation in General

A question of law which was not presented to nor passed upon by the trial court cannot be raised on appeal.

4 Cases that cite this headnote

Attorneys and Law Firms

***572** Carl Pursel and N. R. Haskell, for plaintiff in error.

W. F. Schuermeyer, for defendants in error.

Opinion

HAYES, J.

Only one proposition is presented to this court by the appeal in this case, and that is whether the mayor's court had jurisdiction of the case. It is the contention of defendant that the mayor's court was without jurisdiction, and that the judgment therein was void, from which no appeal would lie, for the reason that the statute conferring upon mayors' courts of the Indian Territory jurisdiction in civil cases coextensive with the jurisdiction of the United States commissioners was violative of the Constitution of the United States and void. Able counsel for defendant in a very exhaustive brief have reviewed the various provisions of the statutes enacted by Congress that attempted to confer jurisdiction in certain civil cases upon mayors' courts in the Indian Territory; but it is not necessary for us to consider any of these acts, or the provisions thereof, other than that portion of section 57z4, Ind. T. Ann. St. 1899, which reads: "That mayors of such cities and towns, in addition to their other powers, shall have the same jurisdiction in all civil and criminal cases arising within the corporate limits of such cities and towns as, and coextensive with, United States commissioners in the Indian Territory, and may charge, collect and retain the same fees as United States commissioners now receive and account for to the United States. ***"

It is not contended that the language of this provision is inadequate to confer upon mayors of cities and towns of the Indian Territory such civil jurisdiction as United States commissioners have, but that the provision is violative of the Constitution of the United States, and void, for the reason that the procedure in civil cases before the United States commissioners and the character of said courts were governed and determined by chapter 91 of Mansfield's Digest of the Statutes of Arkansas, extended in force in the Indian Territory (Ind. T. Ann. St. 1899, c. 41), governing procedure in courts of the justices of the peace, and for the reason that under such chapter no trial before a common-law jury could be had in the United States commissioners' courts, and, since the same chapter governs the mayor's court, such trial could not be had in the mayor's court. Defendant further contends that there was no appeal from the judgment of mayors' courts to the United States Court in the Indian Territory, and that therefore, since a person sued in the mayor's court could not have obtained in such court a trial by common-law jury, and since there was no provision for an appeal from the judgment in the mayor's court, said statute conferring jurisdiction upon the mayors' courts in civil cases deprived one sued therein of the right guaranteed by the seventh amendment to the Constitution of the United States. The sole ground upon which the constitutionality of said section 57z4 is attacked is that it confers jurisdiction upon a court in which a trial by a common-law jury cannot be had and from which there is no appeal, and that the fact that there is no appeal renders it unconstitutional. But this contention cannot be well taken. The United States Court of Appeals of the Indian Territory, in the case of ***573** Railway Co. v. Phelps, 4 Ind. T. 706, 76 S. W. 285, held that an appeal may be taken from the judgment of a mayor's court in incorporated towns and cities of the Indian Territory to the United States courts, and the rule announced by the court in that case was followed by the same court in Railway Co. v. Joyce, 5 Ind. T. 24, 76 S. W. 1104, and in Railway Co. v. Pickens, 5 Ind. T. 26, 76 S. W. 1104. This had become the settled construction of the statute in the Indian Territory, and no good reason has been called to the attention of this court why the rule announced by the court in those cases should be overruled.

The transcript of the record in the case at bar from the mayor's court, filed on appeal in the United States Court for the Western District of Muskogee, was certified by W. W. Momyer, acting mayor of the city of Muskogee, and the copy of the judgment contained in the transcript recites that "the mayor, F. B. Fite, being absent, the case was heard by W. W. Momyer, acting mayor. Neither party demanding a jury, the court proceeded to try the issues joined. ***" Section 564, Ind. T. Ann. St. 1899, provides: "Whenever the mayor of an incorporated town or city of the second class is unable to perform the functions of his office, or is absent and cannot be obtained, the recorder of said incorporated town or city of the second class shall be authorized and empowered to perform the functions of a magistrate during the disability or absence of said mayor, with all the power and jurisdiction of said mayor, to all intents and purposes whatever." The city of Muskogee was a city of the second class at the time of the trial of this suit in the mayor's court, and under this section, when the mayor was absent and could not be obtained, the city or town recorder was clothed with all the powers and jurisdiction of the mayor. One of the powers conferred upon the mayor by section 57z4, supra, was to hear and determine civil actions, concurrent with the jurisdiction of United States commissioners. It follows that, in the absence of the mayor, the city recorder of Muskogee had authority, acting as mayor of the city, to hear and try the case at bar. But the transcript of the record from the mayor's court does not disclose that W. W. Momyer was the recorder of the city of Muskogee. No objection was made at the trial in the mayor's court, so far as the record discloses, that Momyer was not the city recorder, and that he was without authority to act as mayor during the absence of the mayor; nor was such objection made in the United States Court, to which the case was appealed. It is made for the first time in this court, and it is not affirmatively made here. We are asked to presume that he was not recorder, and accordingly not authorized to act as mayor, for the reason that the record fails to disclose affirmatively that he was the recorder. The statute does not specify that the recorder shall style himself or be styled as an "acting mayor" while he exercises the powers and functions of the mayor in the absence of the mayor; but such in fact he is under the law. The mayor is a judicial officer of the mayor's court. In his absence the recorder fills his place and exercises the judicial functions and powers conferred upon the mayor.

Our attention has been called to many authorities holding that the transcript from the justice court on appeal must affirmatively show that the justice court had jurisdiction; but these authorities are not applicable to the question here raised. The record in this case does affirmatively show that the amount in controversy is within the jurisdiction of the mayor's court, and that summons was issued and served upon defendant, and that he appeared and defended at the trial. It clearly appears that the mayor's court had jurisdiction both of the subject-matter of the action and of the parties thereto;

but the objection raised, and for which a reversal of this case is urged, is that the record does not show that the person who presided as mayor did so with authority, and that we must therefore presume that he did not have authority. This question does not go to the jurisdiction of the mayor's court, but goes to the right and authority of the person who acted as the judicial officer of that court in the trial of the case at bar. If he was without authority to act as mayor, then the judgment of the mayor's court would be invalid, but not for the reason that the mayor's court had not jurisdiction of the subject-matter of the action or of the parties thereto. It is not a question of jurisdiction, and therefore, when defendant failed to raise this question in the United States Court for the Western District at Muskogee, to which court the case was appealed and tried de novo, he waived it, and cannot be heard to urge it for the first time in this court. Smith v. Maberry, 61 Ark. 515, 33 S. W. 1068, is a case in which the facts are not exactly similar to those in the case at bar, but in which the court applied a principle that we think should be applied in this case. In that case the transcript of the record from the justice court failed to disclose that any judgment had been rendered in the justice court, or that any affidavit for appeal from the justice court to the circuit court had been made. The case proceeded to a trial de novo in the circuit court, and on appeal from that court to the Supreme Court appellant for the first time urged that the circuit court was without jurisdiction to hear and determine the cause by reason of such defect in the record. Although the Supreme Court of Arkansas had repeatedly held that failure to file an affidavit for an appeal from a judgment in a justice court as required by statute is ground for dismissal of the appeal in the circuit court, it held in that case that, since the justice court had jurisdiction, the failure of appellee to object in the circuit ***574** court to the failure of the record to show that a valid judgment had been rendered in the justice court, or that an affidavit for appeal had been filed, waived such objection. We think the reasoning and the rule of the court in that case applies to the case at bar. Petty v. Durall (Iowa) 4 G. Greene, 120, is a case that was tried in the trial court by a special judge, who served as such under an agreement of the parties to the action, when the law and the Constitution of Iowa provided that special judges should be elected. On appeal the case was reversed on account of such irregularity, but on motion to dismiss the appeal, for the reason that the special judge was without jurisdiction to act, the court held that the judgment of the trial court was coram non judice, but still it was a judgment from which an appeal would lie, and refused to dismiss the appeal.

Defendant in the case at bar, without objecting in the court below to the authority of the person who tried the case in the mayor's court as acting mayor, proceeded to a trial of the case de novo both on questions of law and fact, and he has had a trial of the same before a jury as provided by law in a court that had original jurisdiction of the case, and we think there is no error properly presented to this court for which the case should be reversed.

It is therefore ordered that the judgment of the lower court be affirmed.

WILLIAMS, C. J., and TURNER, KANE, and DUNN, JJ., concur.

All Citations

22 Okla. 21, 97 P. 572, 1908 OK 171

24 Okla. 176
Supreme Court of Oklahoma.

EVERTS
v.
TOWN OF BIXBY.

July 13, 1909.

***621** *Syllabus by the Court.*

A prosecution for the violation of an ordinance of an incorporated town, under the laws in force in the Indian Territory prior to statehood, is a civil, and not a criminal, proceeding.

1a. The recital of the record on review in this court will control, over the statement of a motion on the part of the plaintiff in error, which was supported in the district court only by her affidavit.

The affidavit for appeal appearing in the record never to have been sworn to before any officer, nor to have been filed in the mayor's court within the time required by law, *held*, that the district court on either ground would be justified in dismissing the appeal.

The plaintiff in error, as appellant from the mayor's court to the district court, having failed to lodge the transcript in the district court by the first day of next term after the judgment was rendered in said mayor's court, further, said cause having been set for trial, the plaintiff in error having notice thereof, and it having been reached on due call of the docket for trial, the plaintiff in error not being present either in person or by attorney, *held*, that the district court was justifiable in reaching the conclusion that said plaintiff in error had failed to prosecute her appeal.

3a. The plaintiff in error having failed to prosecute her appeal, it was at the option of the defendant in error either to proceed to trial on the appeal, or have judgment rendered for the amount of the original judgment and costs in its favor.

A motion to set aside an order of the district court, dismissing an appeal on account of laches of the appellant, involves the exercise of a discretion by such court; and, where the record fails to affirmatively show an abuse thereof, the judgment of the lower court should not be disturbed.

Synopsis
Error from the United States Court for the Western District of Indian Territory at Tulsa; W. R. Lawrence, Judge.

West Headnotes (5)

[1] **Appeal and Error** Recitals

A recital in the record will prevail on review, over the verified statement of a motion by plaintiff in error, otherwise unsupported.

[2] **Appeal and Error** Discretion of intermediate or lower court

A motion to set aside a district court order dismissing an appeal from the mayor's court for laches involves the exercise of discretion; and, where an abuse does not affirmatively appear, its action will be affirmed.

[3] **Courts** Requisites and proceedings for transfer of cause

An appeal may be dismissed where the appeal affidavit is not sworn to, or where it is not filed within the time required.

[4] **Courts** Return, statement, record or transcript, and assignment of errors

Where appellant not only failed to file the transcript in time, but was not present when the case was called, there was a failure to prosecute the appeal, and under Int.T.Ann.St.1899, § 2832, Mans.Dig. § 4152, it was at the option of appellee either to proceed to trial, or have judgment for the amount of the judgment appealed from and costs.

1 Cases that cite this headnote

[5] **Municipal Corporations** Criminal Prosecutions

Proceedings for a violation of city ordinances are civil, and not criminal, in their nature.

1 Cases that cite this headnote

Mrs. W. M. Everts was fined in the mayor's court of the town of Bixby for violation of an ordinance, and prayed an appeal to the United States Court for the Western District ***622** of the Indian Territory. The appeal having been thereafter dismissed for want of prosecution, and the cause remanded to the mayor's court. Mrs. Everts moved to set aside such order, which motion was denied, and she brings error. Affirmed.

On the 12th day of June, 1907, the plaintiff in error, as plaintiff, filed in the United States court for the Western District of the Indian Territory at Tulsa a transcript from the mayor's court of the incorporated town of Bixby, Ind. T., showing the following proceedings in the mayor's court: Complaint filed April 15, 1907, charging violation of Ordinance No. 5, which required an occupation or license tax. On the same day a trial was had, and judgment rendered by fine against the defendant (plaintiff in error) in the sum of $24, and the further sum of $4.90 as costs. Defendant prayed an appeal to the district court, which was granted; said defendant entering into a bond conditioned as required by law, with J. F. Pautler and L. P. McGuire as sureties, which was filed and approved on April 15, 1907. On the same day she subscribed her name to an affidavit for appeal, but there does not appear to have been any jurat attached to said affidavit, or that it was indorsed as filed. On the 17th day of July, 1907, in the United States Court for the Western District of the Indian Territory at Tulsa, the case was called for trial, and the defendant did not appear. The plaintiff entered an appearance, and moved that the appeal be dismissed for want of prosecution, and that the cause be remanded to the mayor's court to carry out the judgment. Whereupon the court sustained said motion. On the 19th day of July, 1907, defendant filed a motion to set aside said order, on the ground (1) that said court had no other, different, or greater, jurisdiction than the mayor of said incorporated town had when said case was pending before him; (2) that no complaint or affidavit charging defendant with having violated any of the ordinances of said incorporated town was filed, as required by law; (3) that said action was a civil proceeding, and no summons was ever issued therein, and no appearance was made, etc.; (4) that the mayor had no jurisdiction; (5) that the failure to appear did not authorize the court to dismiss the appeal for want of prosecution, etc.; (6) that the nonappearance of the defendant did not amount to a failure to prosecute the appeal, etc.; (7) meritorious defense; (8) failure to appear was on account of unavoidable delay; and (9) failure to file transcript in apt time was waived. On July 23, 1907, said motion was overruled. No affidavit or proofs are shown to have been offered in support of said motion.

Attorneys and Law Firms

Francis R. Brennan, for plaintiff in error. Chas. R. Reuter, for defendant in error.

Opinion

WILLIAMS, J. (after stating the facts as above).

The plaintiff in error makes five specifications of error, or assignments as to why the judgment of the lower court should be reversed; but we will consider them all together.

The first three contentions, made in support of said specifications, are to the effect that the action was a criminal prosecution, and that neither the said mayor's nor the district court had any jurisdiction. But that question is neither properly raised here, nor is it essential to the determination of this appeal to pass on same. However, in the case of Fortune v. Incorporated Town of Wilburton, 5 Ind. T. 252, 82 S. W. 738, and Id., 142 Fed. 114, 73 C. C. A. 338, 4 L. R. A. (N. S.) 782, a controlling case has expressly decided that a prosecution for the violation of a town ordinance is a civil, and not a criminal, action.

It is further contended that, if it was a civil proceeding, no summons as required by law was served on the plaintiff in error. In the case of Hodges et al. v. Frazier, 31 Ark. 60, the court said: "The defendants appealed to this court, and here argue that, Chick being a nonresident, no affidavit of that fact appears to authorize a warning order against him. Whether such affidavit was lost with the original papers does not appear. It is not material. Chick having appealed to this court from the original decree which was reversed, he thereby became a party to the proceeding, and must follow the cause to its conclusion, or take the consequences." In the case of Farmers' National Bank of Vinita, Plaintiff in Error, v. First National Bank of Pryor Creek, Defendant in Error (decided by this court at this term, but not yet officially reported) 103 Pac. 685, it was held that, the United States Commissioner exercising the jurisdiction of a justice of the peace by virtue of certain statutes of Arkansas extended to, and put in force in, the Indian Territory (Act Cong. May 2, 1890, c. 182, 26 Stat. 98 Ind. T. Ann. St. 1899, p. 13, § 39; Act Cong. March

1, 1895, c. 145, 28 Stat. 695, Ind. T. Ann. St. 1899, p. 17, § 48), having jurisdiction of the subject-matter, and having rendered judgment without having jurisdiction of the person of the defendant, when such defendant appeared and filed an affidavit for appeal to the United States Court for the Northern District of the Indian Territory at Vinita, and superseded the judgment, it thereby entered its appearance, and made itself a party to the proceeding, and could not thereafter be heard to complain of the judgment rendered in the United States Court at Vinita.

As to the contention that no complaint had been filed in the mayor's court, and therefore no jurisdiction was acquired of said action, either by the mayor's or district court, the record recites that a complaint was filed on April 15, 1907, charging defendant with not having paid an occupation or license tax, in violation of Ordinance No. 5 of the incorporated town of Bixby, and such recital will prevail ***623** on review in this court over the verified statement of the motion of the plaintiff in error, otherwise unsupported.

As to the further contention that the manager of a store is not personally liable for an occupation tax for such concern, and that that was the capacity in which the defendant was prosecuted and fined in said case, that question is not properly before this court. The only question here under the record is whether or not the lower court erred in dismissing the appeal, and not sustaining the motion to set aside such order. The affidavit for appeal, as it appears in the record, whilst it is signed by the plaintiff in error, does not appear to have ever been sworn to before any officer, as there is no jurat attached thereto, nor does it show that it was filed within 30 days after the rendition of said judgment. That of itself was sufficient to justify the court in dismissing the appeal. In addition to that it appears that the transcript was not filed by the first day of the next term of the court, as required by the statute (Mansf. Dig. § 4139, Ind. T. Ann. St. 1899, § 2819), and it has been held in numerous cases by the Supreme Court of Arkansas, which control in the case at bar, that on such failure the circuit court has the discretion to affirm the judgment of the lower court or dismiss the appeal; and, unless there has been an abuse of such discretion, same would not be disturbed on appeal. Smith et al. v. Allen, 31 Ark. 270; McGehee v. Carroll & Jones, 31 Ark. 550; Hughes v. Wheat, 32 Ark. 392. In the case of Brown et al. v. Gorman, 7 Ind. T. 747, 104 S. W. 1163, the foregoing rule was followed by the United States Court of Appeals for the Indian Territory, wherein the court said: "Appellant argues from this section that it was the duty of the justice (mayor) to send up the transcript, and that, if the mayor failed to do his duty in this respect, the appellant should not be made to suffer on account of such negligence. But the Supreme Court of Arkansas has held that it is the duty of the appellant to see that the transcript is filed as required; and, if he fails to do so, the circuit court may, in its discretion, dismiss or affirm for failure to prosecute the appeal."

It is further urged that the failure of the appellant to be present did not justify the court in dismissing her appeal for want of prosecution, or give the court any different or greater powers or jurisdiction than it would have had if she had been personally present in court, in which event it would have been necessary for the case to have been tried de novo; and further, that her failure to be present was not a failure to prosecute her appeal within the meaning of the law. In this instance she had not only failed to file the transcript with the clerk of the court, as required by law, but when the case was reached on the regular call of the docket, she failed to be present to proceed with the trial of the same. It is insisted by the plaintiff in error, in her motion to set aside the judgment of the lower court, that the defendant in error had waived the laches in not filing the transcript in time. On examination of the record we find that in the motion of plaintiff in error to set aside said order dismissing her appeal it is contended that the attorney for defendant in error wrote her attorney the day before the appeal was dismissed as follows: "This case is subject to call now for trial. There are 4 cases for trial set before it. This case may not be called before 9 o'clock a. m. Thursday, July 18, 1907. There are no motions on file nor will any be filed by the appellee on account of failure of appellant to file transcript." The bill of exception does not show that there was any proof made on that point other than the statements made in the motion to set aside the order. Section 2832, Ind. T. Ann. St. 1899 (Mansf. Dig. § 4152; Sand. & H. Dig. § 4448; Gantt's Dig. § 3838; Kirby's Dig. § 4683), provides: "If the party appealing moves to dismiss in the circuit court, or fails to prosecute his appeal, it shall be at the option of the appellee either to proceed to trial on the appeal or have judgment rendered for the amount of the original judgment and costs where it was in his favor or in bar of the original judgment where it was against him." In this case the defendant in error did not move to dismiss in the district court until the plaintiff in error failed to appear. She failed to prosecute her appeal, not only by failing to file the transcript in time, as required by law, but also to be present in court to prosecute same. The statute provides that in such event the appellee may have judgment rendered for the amount of the original judgment and costs, where it was in his favor. The motion to set aside the order, being overruled by the court, involved the exercise of a discretion, and, where the record fails to affirmatively show an abuse of such, the judgment of the lower court should not be disturbed.

Failing to find any reversible error in the record, the judgment of the lower court is affirmed. All the Justices concur.

All Citations

24 Okla. 176, 103 P. 621, 1909 OK 164

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